LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
NOV 14 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 616

ALLEGHANY CORPORATION,

Appellant,

v.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION AND APPLICATION FOR SUMMARY REVERSAL

WHITNEY NORTH SEYMOUR,
120 Broadway,
New York 5, New York

DAVID HARTFIELD, JR.,
14 Wall Street,
New York 5, New York

EDWARD K. WHEELER,
Southern Building,
Washington 5, D. C.

Attorneys for Appellant,
Alleghany Corporation

TABLE OF CONTENTS

	PAGE
Opinions Below and Prior Opinion	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
The Questions Presented Are Substantial	7
I. This Court should summarily reverse the judgment of the District Court	7
II. The decision of the District Court on other questions was also erroneous	14
Conclusion	19
Appendix A	21
Appendix B	67

CITATIONS

CASES:

Alleghany Corp v. *Breswick & Co.*, 353 U. S. 151 (1957)	2, 4, 7
Briggs, Administratrix v. *Pennsylavania R. Co.*, 334 U. S. 304 (1948)	12
Franklin v. *Jonco Aircraft Corporation*, 346 U. S. 868, reh. den. 346 U. S. 917 (1953)	12

PAGE

Riss & Company v. *U. S.*, 342 U. S. 937, reh. den. 343 U. S. 937 (1952) 12

Tyler v. *Magwire*, 17 Wall. 253, 282 (U. S. 1872) .. 12

United States v. *Pallets*, 330 U. S. 812 (1947) 12

White v. *Howard*, 347 U. S. 910 (1954) 12

STATUTES:

Interstate Commerce Act

§ 5(2) 14

§ 5(4) 14

§ 5(7) 14

§ 20a 4, 6, 14, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ----

ALLEGHANY CORPORATION,

Appellant,

v.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION AND APPLICATION FOR SUMMARY REVERSAL

Alleghany Corporation (Alleghany) appeals from the judgment of the United States District Court for the Southern District of New York entered on October 17, 1957, setting aside two orders of the Interstate Commerce Commission (ICC). Appellant submits this Statement and Application to show that the Supreme Court of the United States has jurisdiction of the appeal and that the judgment of the District Court should be reversed with directions to dismiss appellee's complaint.

Opinions Below and Prior Opinion

Neither the opinions of the District Court nor of the ICC are reported. Copies of the opinion and judgment of the District Court as well as copies of the opinion and orders of the ICC are attached hereto as Appendix A.

The opinion of this Court reversing the earlier judgment of the District Court and remanding, is reported in 353 U. S. 151.

Jurisdiction

This suit was brought under 28 U. S. C. §§ 1336, 1398 and 2321-2325 to set aside orders of the ICC. The judgment of the District Court was entered on October 17, 1957 and Alleghany's notice of appeal was filed in that court on October 25, 1957. The jurisdiction of this Court to review this judgment by direct appeal is conferred by 28 U. S. C. §§ 1253 and 2101(b). There are many decisions sustaining the jurisdiction of this Court to review the District Court's judgment on direct appeal, including this Court's decision on the prior appeal in this case: *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151 (1957).

Questions Presented

1. Were the grounds upon which the District Court enjoined, vacated and annulled the preferred stock orders within the scope of and consistent with this Court's remand?

2. After this Court, in upholding ICC's jurisdiction over Alleghany, determined that it was unnecessary to decide whether ICC should have approved Alleghany's control of The New York Central (Central) and remanded this cause "for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock

issue as approved by the Commission was in violation of the Interstate Commerce Act", was it error for the District Court to hold that the preferred stock orders must be vacated for failure to secure ICC's prior approval of such control?*

Statutes Involved

Relevant portions of § 5 and § 20a of the Interstate Commerce Act, as amended, 49 U. S. C. § 5 and § 20a, are set out in Appendix B hereto.

---

* If the judgment of the District Court is within the scope of and consistent with the decision and remand of this Court, the following additional questions are presented:

A. Does 49 U. S. C. § 5(7) mandate investigation and punishment of violations of the Interstate Commerce Act by ICC in the circumstances presented in this proceeding, and if so, must such action by ICC be taken before it may lawfully exercise its regulatory jurisdiction (including jurisdiction with respect to security issues) over alleged violators of the Act?

B. Did the District Court err in concluding that under 49 U. S. C. § 5(2) the obtaining by Alleghany of control of Central required ICC approval?

C. Assuming that Alleghany's obtaining control of Central required ICC approval, was it necessary in the circumstances presented in this proceeding for such approval to be obtained prior to the submission of Alleghany's proposed exchange offer to its stockholders and ICC's approval of the exchange offer?

D. Did plaintiffs have standing to raise the issues involved?

E. In view of 49 U. S. C. § 20a(11), can the 6% preferred stock of Alleghany be invalidated?

F. Did the District Court err in substituting its conception of sound administrative procedure under the Interstate Commerce Act for that of ICC?

G. Did the District Court err in setting aside the preferred stock orders of ICC in this action?

Statement

The prior history of this proceeding is set forth in the opinion of this Court rendered April 22, 1957 in *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151 (1957). Briefly, plaintiffs first brought an action to review orders continuing ICC's jurisdiction over Alleghany, a non-carrier declared by ICC (and by the Securities and Exchange Commission) to be subject to ICC jurisdiction, and later amended their complaint to seek the overturn of orders of ICC entered May 26, 1955 and June 22, 1955 authorizing Alleghany, to issue new 6% convertible preferred stock in exchange for old preferred stock substantially in arrears. On December 23, 1955 the District Court entered judgment pursuant to its decision of November 18, 1955 (138 F. Supp. 123) vacating the preferred stock orders on the ground of lack of jurisdiction in the ICC and the existence of exclusive jurisdiction in the Securities and Exchange Commission (SEC). This Court reversed, holding that ICC, not SEC, had jurisdiction and that, contrary to the opinion of the District Court, it was unnecessary to determine whether the acquisition of control by Alleghany of Central should have been approved by ICC before entry of the challenged orders. It remanded only one narrow question:

> "consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act. . . ."

The District Court on September 27, 1957 filed its opinion and on October 17, 1957 entered its judgment again vacating the preferred stock orders of ICC because, it again held, Alleghany must secure ICC approval of its control of Central and had not done so. The District Court sustained the position of Alleghany and ICC that the orders of ICC approving the preferred stock exchange were adequately supported in all other respects and conformed to the requirements of § 20a of the Act. The District Court stated that it conceded the jurisdiction of ICC but found fault with its exercise, holding that, absent unusual circum-

stances, ICC should not have entertained the application for approval of the issuance of the preferred stock, if at all, until it decided the propriety of Alleghany's control of Central. Thus the District Court decided the one question remanded to it in favor of Alleghany; went on to decide an additional question not remanded to it; and decided that question erroneously and in such a way as to negate the earlier action of this Court. In so doing it denied the authority of ICC to approve the stock issue.

The necessity of approval by ICC of the control by Alleghany of Central was considered, but not decided, by this Court upon the prior appeal. This Court held that it need not resolve the conflict between ICC and the District Court as to the necessity of approval by ICC of Alleghany's success in the proxy contest. The mere existence of that control, whether or not approved, was held by this Court to be significant, and in affirming ICC's jurisdiction to issue the preferred stock orders there seemed to this Court "to be no reason to read in the word 'approved'" (*infra* p. 8). The District Court's decision was that approval of control of Central was required before that jurisdiction could be exercised. Thus its decision flies in the face of this Court's disposition of the matter.

The question of the necessity for ICC approval of this control is not a new issue. It first arose during the course of Alleghany's proxy campaign. Three separate petitions questioning the right of Alleghany to seek control of Central were filed with ICC, not by appellees here, but by Central and groups allied with the then management. One in particular, filed April 6, 1954, prayed an order declaring that Alleghany could not seek such control without prior ICC approval. This petition was dismissed. One of the others was also dismissed and the third was withdrawn. All of this appeared in the ICC report in the record before this Court on the prior appeal and before the District Court on the remand (R. 420-422).*

---

* References are to pages of the printed record on the prior appeal (No. 36, October Term, 1956). The entire record in the prior appeal has been certified to this Court on this appeal.

After Alleghany's successful proxy contest, Alleghany and Central filed with ICC applications for the approval of a merger of certain subsidiary carriers of Central, the lease of their properties and the continuation of control by Central and Alleghany over such subsidiary carriers (R. 210). The status orders approving the merger and lease and the continuance of such control were entered March 2, 1955 and May 24, 1955 (Louisville & Jeffersonville Bridge & Railroad Company Merger, etc.; R. 414, 506). These orders continued Alleghany's subjection to regulation as a non-carrier in control of carriers for many purposes, expressly including security issues under § 20a.

After ICC had approved still another acquisition of control of carriers by Alleghany (Boston & Albany Railroad Company et al. Control Report; R. 450), Alleghany was authorized to issue its new preferred stock by order of May 26, 1955, two days after final affirmance by ICC of the Louisville & Jeffersonville merger and lease application (R. 518). After dismissal of plaintiffs' petition for reconsideration, final approval of the issuance of preferred stock was granted June 22, 1955 (R. 554).

All of these orders were stricken down by the December 23, 1955 judgment of the District Court, which held that jurisdiction over Alleghany was in SEC, not ICC. It was this judgment which this Court reversed and remanded, holding ICC had jurisdiction to enter all of the orders, including those approving the preferred stock exchange offer. The District Court, however, has disregarded the limited nature of the remand and has undertaken to go beyond it and hold that ICC had jurisdiction only to discipline Alleghany, but could not approve the issuance of its preferred stock in this case.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

This Court should summarily reverse the judgment of the District Court.

Although the action of the District Court raises substantial questions for this Court's determination, we submit such questions should be decided summarily by this Court in favor of Alleghany.

The decision of the District Court is patently in conflict with the decision and mandate of this Court in *Alleghany Corp.* v. *Breswick & Co., supra.* The effect of the District Court's decision is to reaffirm its judgment of December 23, 1955, disregarding the intervening reversal by this Court.

The District Court once again holds Alleghany could not legally acquire control of Central in a proxy contest without ICC approval. In so doing, the District Court pays only lip service to the judgment of this Court. When it reversed the District Court's 1955 judgment vacating the preferred stock orders, this Court said (353 U. S. at 161):

> "The District Court held that whatever control Alleghany had over Central did not fit within the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' because the Commission had not given the approval necessary for acquisition of control of Central and its subsidiaries, 'two or more carriers.'
>
> The Commission and Alleghany contend that Commission approval of the acquisition of a single, integrated system is not necessary. We need not decide this question, however, and intimate no opinion on it, for even if such approval is necessary, the statutory

requirement of 'a person which is not a carrier and which has control of one or more carriers' refers to 'control' and not to 'approved control.' There seems to be no reason to read in the word 'approved.' Such a holding would mean that the failure of a company engaging in a transaction requiring Commission approval to apply for that approval would deprive the Commission of jurisdiction. Remedies against a violator are provided by § 5(7), (8), and (9) of the Act. To punish a violator by depriving the Commission of jurisdiction over it would be indeed quixotic. As the Commission points out, the problem would appear clearer were Alleghany contesting, rather than acquiescing in, its jurisdiction.

Control in fact then is sufficient to satisfy the requirement of § 5(2).

• • •

For all these reasons, the judgment of the District Court must be reversed and the case remanded for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act. • • •"

The remand, limited to "appellees' claim, not previously discussed", clearly reflects this Court's intention to return to the District Court only those contentions attacking the preferred stock orders which were previously advanced by the appellees (plaintiffs) and not mentioned in this Court's opinion. These claims included such points as the alleged unfairness of the preferred stock exchange offer and the claim that the findings of ICC were not adequately supported. They had not been "previously discussed" by this Court. On the other hand, the question of the necessity for ICC approval of Alleghany's control of Central was discussed by this Court in its opinion (*supra*, pp. 7-8) and therefore was not within the remand.

After the remand by this Court, the plaintiffs reiterated in the District Court their numerous attacks upon the preferred stock exchange offer. Each of the plaintiffs' asser-

tions was answered by the defendants and each was fully briefed and argued. The District Court in its opinion (Appendix A, pp. 23-25) dealt separately with each of the plaintiffs' contentions attacking the preferred stock orders and rejected them all. The District Court, however, despite the holding by this Court that the question of the necessity of ICC approval of Alleghany's control of Central need not be resolved, itself raised the question at the argument, rejected defendants' assertion that the matter was not within the remand and concluded by reasserting its previous position that Alleghany's control over Central is illegal. On that ground, the District Court vacated ICC's preferred stock orders. It is untenable to suggest, as the District Court seems to do, that this Court, in squarely holding it unnecessary to resolve the control question to sustain ICC jurisdiction, intended the control question to be determinative of the merits of the preferred stock issue and thus overlooked the decisive issue in the case.

It is evident from the District Court's opinion that despite the previous ruling of this Court, it refuses to give up its predeliction for regulation of Alleghany by SEC rather than by ICC. Whereas this Court conclusively established that ICC, not SEC, had jurisdiction of Alleghany and held that it was not necessary in reaching that decision to rely on any authorization by ICC of Alleghany's control of Central, the District Court now suggests the ICC should consider "whether it will authorize the continuation of [Alleghany's] control [of Central], upon which its jurisdiction over Alleghany depends." Until such time, the District Court states, ICC should not approve the preferred stock exchange offer.

The preference for regulation of Alleghany by SEC, evident in the 1955 opinions of the District Court, recurs in other portions of its 1957 opinion. It states "the assumption of regulatory responsibility by the Commission [ICC] shields the person guilty of the unapproved acquisition [Alleghany] from regulation by another agency [SEC]"

(Appendix A, p. 26). In another part of the opinion the District Court reiterated the same theme in stating that unless the ICC intends to approve Alleghany's control of Central "it would be granting a wrongdoer sanctuary from the Investment Company Act" (Appendix A, p. 30).

Although the District Court asserts that it has recognized ICC's jurisdiction, it is respectfully submitted it has not correctly read this Court's holding on the point. This Court determines, not abstract generalities considered in a vacuum, but concrete controversies in the light of the factual context in which they arise. We believe this Court's prior opinion determined, not a loose unoriented question of whether ICC had "jurisdiction" over Alleghany, but the specific, concrete question posed which was whether ICC had *jurisdiction over Alleghany's preferred stock application.* Indeed, this Court held that it was only for the purpose of questioning the preferred stock orders, as distinguished from the orders imposing on Alleghany the status of a carrier entered in the Louisville & Jeffersonville merger proceeding, that plaintiffs had any standing to sue at all. Since this Court decided the question affirmatively, the District Court is not now free to hold that, while ICC had an undefined, general suzerainty over Alleghany, it still lacked power to exercise its jurisdiction over the preferred stock application.

The District Court's opinion states (Appendix A, p. 25) that one of the principal questions the District Court had to determine with respect to ICC's procedure in approving the preferred stock issuance, although failing to approve Alleghany's control over Central, is "may the Commission [ICC] proceed to regulatory determinations, deferring meanwhile the question of whether it will authorize the continuation of this control [Alleghany's control of Central], upon which its jurisdiction over Alleghany depends." This is inconsistent with the holding of this Court on the prior appeal. The holding of this Court was that ICC had jurisdiction to issue the preferred stock

orders irrespective of any approval by ICC of Alleghany's control, or continuance of control, of Central. It was only on this basis that this Court could have sustained ICC jurisdiction without passing upon whether ICC needed to approve Alleghany's control of Central. The District Court by its action has reduced this Court's holding to a meaningless abstraction.

The inconsistency of the District Court's decision is even more apparent in the reasoning of its opinion. To answer in the negative, as the District Court did, the question it propounded as to whether ICC could "proceed to regulatory determinations, deferring meanwhile the question of whether it will authorize the continuation of this control" must logically mean that ICC could proceed to no regulatory determinations until the question of Alleghany's control of Central was passed upon. Yet, if this be so, ICC's "regulatory determination" of the validity of Alleghany's acquisition of control of the Louisville & Jeffersonville was just as improper as the District Court finds the determination of the preferred stock question to be. This Court, however, has conclusively held that the regulatory determination with respect to the Louisville & Jeffersonville merger was proper. Nevertheless, even now the District Court persists "that Alleghany's unauthorized seizure of control of the Central *and its subsidiaries* was unlawful, and that this continued control *of these carriers* is unlawful as well" (Appendix A, p. 27, emphasis supplied). As if for emphasis, the District Court adds that Alleghany "now claims the advantage of less rigidly restricted financing which the Investment Company Act intended only for a person who had previously satisfied the Interstate Commerce Commission that his control *of a carrier* would be consistent with the public interest" (Appendix A, p. 29, emphasis supplied). Not only has Alleghany satisfied ICC that its control of "a carrier" would be consistent with the public interest, it has also satisfied this Court that such is the case. Only the District Court remains unpersuaded.

In view of the conclusion of the District Court that plaintiffs' attacks upon the preferred stock exchange offer —the only matters remanded—were without merit, proper conformity with the mandate of this Court required that the District Court dismiss the complaint.

That a lower court is not at liberty to disregard or evade the mandate of this Court needs no argument. As this Court said in reversing for a second time the judgment of a state court in *Tyler* v. *Magwire*, 17 Wall. 253, 282 (U. S. 1872):

> "By the directions of the mandate they [the lower court] were as much bound to proceed and dispose of the case in conformity to the opinion of this court as to reverse their former decree, but instead of that they entered a new decree dismissing the petition, which in effect evades the direction given by this court, and practically reverses the judgment and decree which the mandate directed them to execute."

See also *Briggs, Administratrix* v. *Pennsylvania R. Co.*, 334 U. S. 304 (1948) and cases cited therein.

Summary reversal is appropriate in this case. It is consistent with this Court's practice in cases not only where the law is settled by a prior decision (e. g. *United States* v. *Palletz*, 330 U. S. 812 (1947), and five subsequent cases summarily reversed on the authority thereof reported in 330 U. S. 812 and 331 U. S. 791 (1947)) but also where the action of the lower court was clearly improper (*Franklin* v. *Jonco Aircraft Corporation*, 346 U. S. 868, reh. den. 346 U. S. 917 (1953)). Similarly, where following a denial of certiorari to a state court, a Federal District Court entertained a new action between the same parties and granted the relief which had been denied in the state court action, this Court granted a motion for summary reversal on appeal. (*White* v. *Howard*, 347 U. S. 910 (1954)). Summary procedure has been employed in cases arising under the Urgent Deficiencies Act. (*Riss & Company* v. *United States*, 342 U. S. 937, reh. den. 343 U. S. 927 (1952)).

Nearly two years ago Alleghany in its statement as to jurisdiction filed in connection with the first appeal to this Court referred to the hardship created by the action of the District Court in vacating these same preferred stock orders in December of 1955. What was said then is essentially still true.* The passage of time has only intensified the hardship. Whereas at that time the District Court had not passed upon the fairness or desirability of the preferred stock exchange offer, it has now ruled that ICC's approval of the exchange offer was within its competence. Nevertheless, for essentially the same reasons as before, the District Court has once again vacated the preferred stock orders. In view of the crowded condition of this Court's docket, which may prevent this case from being reached for argument in regular course for many months, the decision of the District Court will necessarily prolong and aggravate the hardship to Alleghany and its security holders unless this Court grants summary reversal.

---

* * * * * The destruction of the exchange offer was decreed by the District Court without any consideration of its essential fairness and desirability. From the dry and sterile conclusion that there were jurisdictional and procedural flaws in the I. C. C.'s assertion of jurisdiction over Alleghany, the District Court swept forward to a destruction of the exchange offer and invalidation of the orders permitting the stock issuance under circumstances which place Alleghany and all its stockholders in extreme distress. * * * Nine hundred thousand shares of the new preferred stock were physically delivered to their rightful holders, and 400,000 shares were in the hands of the exchange agent for transmission to the old preferred stockholders, when the District Court's original ex parte restraining order took effect, precluding any further delivery or transfer of the preferred stock. The cloud thus created still hangs over the stock issue with the result that, despite a partial stay of the injunction with respect to transference of the 900,000 shares delivered prior to the effective date of the restraining order, trading in the entire issue of 6 percent convertible preferred stock continues suspended on the New York Stock Exchange and the National Association of Securities Dealers has admonished its member firms to refrain from taking part in any trading of this security. Alleghany preferred stockholders, whether they received physical delivery of their new stock certificates or not, thus have had their asset frozen and are unable either freely to sell or hypothecate their Alleghany preferred stock."

II.

The decision of the District Court on other questions was also erroneous.

Alleghany believes that the action of the District Court, being outside the scope of and inconsistent with the terms of this Court's remand, should be summarily reversed. If, however, this Court should deem it desirable that the case be set down for full argument, additional substantial questions are presented as noted in the footnote to page 3 of this Statement. Considerations bearing upon the substantial nature and importance of these questions are outlined in this Part II.

1. The District Court found its starting point in §§ 5(4) and 5(7) of the Interstate Commerce Act, which prohibit acquisition of control of carriers in violation of § 5(2) and provide for such action by ICC as it shall deem necessary to remedy violations found by ICC. In so doing, it disregarded the approved control of Alleghany over subsidiary carriers of Central considered and affirmed by this Court on the prior appeal, and held that absent unusual circumstances, ICC was prevented by these sections from granting an application by Alleghany for approval of the issuance of securities. By its action, the District Court has injected in § 20a proceedings a requirement of findings not contemplated or required by Congress in enacting the statute. So far as Alleghany can ascertain, neither ICC nor any court has previously considered § 5(7) to so sap the meaning and requirements of § 20a.

2. The District Court sought justification for its position in § 20a of the Act. Pointing out that § 20a was passed to insure sound railroad financing and to protect the investing public against dissipation of railroad resources, it argued that the adequacy of the security of the new preferred stock could not be determined until ICC had acted under § 5(7). The District Court arrived at this result by assuming that divestiture by Alleghany of its shares of

Central might be ordered by ICC, and that the remaining assets might then be insufficient to cover the new issue of preferred stock.

As ICC implicitly recognized, the underlying assets of Alleghany, and hence the security for the new preferred, are neither relevant nor material when the authorization sought is to issue new in exchange for old preferred shares and where the par value of the new preferred stock is not greater than that of the preferred stock for which it is to be exchanged. This is particularly so where the claim of the new preferred stock against the assets of Alleghany in the event of bankruptcy would be substantially reduced by reason of the exchange. The purpose of the exchange was to wipe out the claim of the old preferred stock to $17,862,185 of accrued dividends, a sum greater than Alleghany's investment in Central stock adverted to by the District Court.

Asset coverage is significant only when a new, as distinct from a refunding, security is to be issued or the security to be issued has a greater par or stated value than the one it replaces. To the Alleghany old preferred stockholder who received in exchange shares of new preferred stock, it would not matter whether he held his old certificate or the new one at the time ICC approved or disapproved Alleghany's control of Central. Any cloud upon the value of the stock that would attach to the new preferred stock would similarly and to the same extent have attached to the old preferred stock he surrendered in the exchange. Therefore, the District Court was in error in concluding that the possible effect of an ICC order on Alleghany's control of Central was relevant to authorization of the preferred stock exchange. There is no logical reason so far as protection of investors in Alleghany stock is concerned why ICC should necessarily act on Alleghany's control of Central prior to the time the opportunity to exchange was tendered to them.

The District Court overlooked the fact that even if Alleghany were required by ICC to divest itself of its Central stock, the money received from such sale would be an asset

securing the new preferred stock. If market value is used in determining the value of this asset to the preferred stockholders, the Central stock or the proceeds from its sale would be the same, less broker's commission if sold through a broker.

The plaintiffs lack standing to raise this issue of the adequacy of the security for the new preferred stock and in fact no such issue was raised by them in any of their pleadings filed with ICC. The plaintiffs are common, not preferred, stockholders and therefore clearly could not properly raise an issue which could have relevance only to the new preferred stock. It could not possibly affect dilution, the only basis upon which the plaintiffs acquired standing in these proceedings (353 U. S. at 159, 174). The persons who might raise an issue on the adequacy of the security underlying the new preferred stock would be the preferred stockholders and they, though present and represented by counsel throughout the many court proceedings in this case, have not done so. In these circumstances the District Court had no party before it competent to raise this issue which it injected.

3. The question of the legality of Alleghany's control of Central, if it has any relevance, could conceivably relate only to the validity of the status orders. This Court has not found it necessary to decide that question even to sustain the status orders. These were the orders which approved the continuation of Alleghany's control over subsidiaries of Central. This Court held they were properly entered, that they continued ICC jurisdiction, and precluded SEC jurisdiction. It is not necessary to determine the propriety of control of Central before ICC can authorize the issuance of securities. Yet the District Court would disregard this Court's decision, hold the irrelevant relevant, and consequently prohibit ICC approval of the preferred stock issuance because ICC did not first approve the questioned acquisition of control of Central.

The District Court purports to distinguish the preferred stock orders from the status orders on the ground that the former are for "the private benefit of Alleghany" while

the latter are something different. In so doing, however, it must necessarily disregard the fact that the requirement of approval of security issues is not a favor dispensed by ICC, but a limitation imposed on the freedom to issue securities enjoyed by most corporations not subject to the requirements of regulatory statutes. The Court's cavalier attitude towards the importance of ICC regulation long recognized by Congress points up again its determined preoccupation with its preference for SEC regulation—a matter which it should have regarded as laid at rest by this Court's decision.

In vacating the preferred stock orders, the District Court did not consider the provisions of § 20a(11), although the applicability of this section was urged by all defendants. While this section has apparently not been construed, by its terms it prohibits just such action as was taken here by the District Court in invalidating securities of a carrier subsequent to their issuance pursuant to orders of I. C. C. At the time of the District Court's initial restraining order all shares of the new preferred stock had been issued, and in fact nearly 900,000 had also been delivered by the exchange agent. The entire issue, therefore, was within the protection afforded by § 20a(11).

4. In setting aside the ICC orders, the District Court once again reasserted its previous conclusion that the acquisition by Alleghany of control over Central in a proxy contest required the approval of ICC. While this question was fully briefed and argued on the previous appeal, this Court found it unnecessary to resolve it. Alleghany submits that it was equally unnecessary and, indeed, improper for the District Court to resolve this question on remand in view of the very precise and limited character of the question remanded.

The District Court's decision not only places an important limitation upon the freedom of interstate carrier stockholders to rid their company of inefficient management but casts a cloud as well upon the legality of a vast array of corporate actions of any integrated carrier systems whose control has changed in one way or another. Changes

in control of these carriers are not limited to recent highly publicized proxy contests but may occur without notoriety as a result of reorganization*, the release of controlling stock of a carrier from a voting trust**, the sale of carrier stock by controlling persons***, the distribution of carrier stock as a dividend in kind by a corporate owner****, the replacement of chief executive officers, members of the board of directors or both for one reason or another† as well as many other ways or combinations of ways‡. If the District Court's decision correctly states the law, then indeed changes in management may no longer be possible since in the relatively short time between annual elections it is doubtful that an insurgent group could obtain the necessary approval in time to conduct a campaign. But far more importantly, since control of integrated carrier systems has constantly shifted in the past several decades, without any ICC approval, there may scarcely be a legal railroad management in the land and innumerable actions taken by these unapproved managements may be vulnerable to attack on the precise basis the District Court uses to invalidate Alleghany's preferred stock issuance.

---

* For example, New York, New Haven & Hartford R. R., Chicago & NorthWestern Ry., Missouri Pacific R. R. and Chicago, Rock Island & Pacific R. R.

** For example, Monon Ry., Denver & Rio Grande Western R. R., and United States Trucking Company.

*** For example, Missouri-Kansas-Texas R. R., Chesapeake & Ohio Ry. and Chicago, Great Western Ry.

**** For example, New York, Chicago & St. Louis R. R. and Wheeling and Lake Erie Ry.

† To name only a few dramatic instances, Missouri Pacific R. R., Central of Georgia Ry., Boston & Maine R. R., Chicago & Eastern Illinois R. R., Delaware & Hudson R. R., Greyhound Corporation, Chicago, Milwaukee, St. Paul & Pacific R. R., and Chicago & North-Western Ry. all have in recent years made changes in their executive committees, boards of directors or chief executive officers.

‡ For example, by testamentary disposition the owner of control of the Western Pacific R. R. vested the controlling interest in the hands of the Executor of his Estate and control of the Missouri-Kansas-Texas R. R. also shifted on death of the stockholder having control.

Conclusion

The District Court resolved all questions remanded to it by this Court in favor of the validity of the orders of ICC in this proceeding. It vacated such orders upon grounds not within the terms of the remand of this Court and in direct conflict with the decision of this Court on the prior appeal. In so doing it erroneously decided substantial questions of public importance. It is respectfully submitted that this Court should note jurisdiction and summarily reverse the final judgment of the District Court, with directions to dismiss appellees' complaint. If summary reversal is not granted, all the questions presented should be considered and none is waived even though not specifically discussed herein.

Respectfully submitted,

WHITNEY NORTH SEYMOUR,
120 Broadway,
New York 5, New York

DAVID HARTFIELD, JR.,
14 Wall Street,
New York 5, New York

EDWARD K. WHEELER,
Southern Building,
Washington 5, D. C.

Attorneys for Appellant,
Alleghany Corporation

APPENDIX A

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BRESWICK & Co., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated,

Plaintiffs,

against

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ALLEGHANY CORPORATION, et al.,

Defendants.

} CIV. 101-114

BEFORE:

CLARK, Circuit Judge and

DIMOCK and WALSH, District Judges

APPEARANCES:

ROSSTON, HORT & BRUSSEL, ESQS. (GEORGE BRUSSEL, JR., and EUGENE G. KING, Of Counsel) for Breswick & Co. and Myron Neisloss

RANDOLPH PHILLIPS, Pro Se

ROBERT W. GINNANE, ESQ., General Counsel for Interstate Commerce Commission (B. FRANKLIN TAYLOR, JR., Assistant General Counsel, with him on the brief)

NOTE: Footnotes are printed following text of opinion.

SIMPSON, THACHER & BARTLETT, ESQS.,
WHITE & CASE, ESQS.,
WHEELER & WHEELER, ESQS., (WHITNEY NORTH SEYMOUR, DAVID HARTFIELD, JR., EDWARD K. WHEELER, and DAVID W. WALLACE, Of Counsel) for Alleghany Corporation

PROSKAUER, ROSE, GOETZ & MENDELSOHN, ESQS., (HAROLD H. LEVIN, MARVIN E. FRANKEL and ALLEN L. FEINSTEIN, Of Counsel) for Defendants Joseph S. Gruss, et al.

EDWARD M. GARLOCK, ESQ., for Defendants Baker, Weeks & Co., Oscar Gruss & Son, Irving Neuman as Trustee under a Deed of Trust dated November 6, 1943, and Edward Gornish.

SAMUEL A. MEHLMAN, Pro Se

ALEXANDER KAHAN, ESQ., and,
A. LICHTENSTEIN, ESQ., (ALEXANDER KAHAN, Of Counsel) for Adelaide Neuwirth and common stockholders of Alleghany Corporation, representatively.

WALSH, D.J.

Plaintiffs, common stockholders of Alleghany Corporation, by this action seek review of an order of the Interstate Commerce Commission authorizing Alleghany to issue certain stock.[1] We had previously held that the Commission lacked jurisdiction to promulgate the order and that the issue was subject to the Investment Company Act. The Supreme Court reversed this holding and held that the issue was subject to the Interstate Commerce Act. It remanded the case to us for consideration of plaintiffs' claim that the issue violated that Act.[1a]

The stock in controversy consisted of 1,367,440 shares of 6% preferred stock having a par value of $10 to be offered ten for one in exchange for the pre-existing 5½% preferred, having a par value of $100. It was to be convertible at the option of the holder into common stock,

according to a formula which resulted in an actual conversion ratio of 4.7 shares of common for each share of new preferred, upon payment to the corporation of $3.75 per common share. The issue of the common stock necessary for conversion was also authorized.

Plaintiffs contend that the Commission's findings as to the fairness of the issue are inadequate and are in conflict with undisputed facts. They claim in substance that the worth of the old preferred was overestimated by giving it a value of $100 par value, plus $5 redemption premium, plus $132 accumulated dividends; that it was improper to include the redemption premium and to assume that the dividends would be readily payable in cash. They suggest that the market value, which never previously exceeded 170, was more realistic and should have been used They also claim that the value of the new preferred was underestimated; that in particular the value of the fifteen year non-call period allowed for conversion was overlooked entirely, although it became markedly apparent when, after the plan of exchange was announced, the market price of the preferred exceeded the $237 value assumed for purposes of the exchange, by almost fifty percent. In other words whereas the old preferred had never sold above $170 prior to the announcement of the plan, its equivalent in the new preferred traded upon a "when issued" basis rose to 352½ prior to the suspension of trading. They claim that the excess of 352½ over 170 represents a "premium" to the preferred stockholders, an excessive benefit at the expense of the corporation and also the common stockholders.

In answer it is contended that the offer of the exchange was the only feasible way in which to get rid of the burden of accumulated dividends without requiring a large outlay of cash; that the benefits to be given the new preferred in order to make the exchange attractive was primarily a matter of business judgment; that the market action of the preferred does not indicate that an excessive premium was given it at the expense of the common because a substan-

tial part of the increase paralleled an increase in the common into which the new preferred was convertible.

As to these contentions of the plaintiffs, we believe that the facts disclosed to the Commission and available as matters of public knowledge were enough to put an expert body on notice of all the alleged undesirable qualities of the issue; that the questions so raised were within the range of expert judgment reserved to the Commission; that its findings thereon satisfy the statute; and that we may not substitute our views for those it expressed.

Plaintiffs also protest that the Commission conditioned its approval upon the change in plan never ratified by the stockholders. The proposed plan had provided that the conversion ratio should be fixed as of the fifth market day following Commission approval. The Commission conditioned its approval upon modification of the exchange offer so that the conversion ratio would be fixed as of the last market day preceding its order. The Commission has power to grant the application "upon such terms and conditions as the commission may deem necessary or appropriate in the premises". 41 Stat. 394, 49 U. S. C. § 20a(3). The question whether the exchange would involve a violation of some contractual arrangement with the stockholders is not before us. This contention does not affect the validity of the Commission's order.

As to matters of procedure, plaintiffs complain that they were entitled to an evidentiary hearing before the Commission and that they were deprived of that right. This point was raised before the Supreme Court and, if not decided adversely to them, we understand the Supreme Court's statement that the point is governed by section 20a(6) of the Interstate Commerce Act, 41 Stat. 439, 49 U. S. C. § 20a(6), to restrict our consideration to the effect of that section. Under that section the Commission has almost free discretion as to how it may best proceed with its investigation. It was not required as a matter of law to hold evidentiary hearings to enable plaintiffs to amplify by cross-examination of corporate officers points already

ascertainable from facts before it. Plaintiffs urge the admitted complexity of the plan and the heavy investment in preferred stock by the dominant officer of Alleghany just before announcement of the plan. They also show that by refusing to thus open its investigation the Commission apparently missed evidence subsequently supplied to the Securities and Exchange Commission, such as a memorandum from Alleghany's files discussing the value of the non-call period, the minutes of the board meeting which are said to show that this feature was not in the plan when originally approved, and an analysis of the market action of earlier conversion warrants which might have foretold the market action of the preferred after the present plan closed. Loss of this type of evidence is, however, a known risk which an agency takes when it declines to open its investigation to controversy. The Commission is given that power by statute.

There nevertheless does remain a major problem—the need for validation of Alleghany's acquisition of the Central system as a prerequisite to the Commission's grant of the relief requested. We do not raise again the question of jurisdiction;[2] but we now raise the question of findings necessary as a preliminary to relief on the merits, action necessary if the order of the Commission is to conform with the Interstate Commerce Act.

The facts now established are that Alleghany has control of the New York Central and that the Central is itself a carrier with control of a large number of other carriers. The Commission was never asked to approve Alleghany's acquisition of control over this group of carriers and has carefully refrained from so doing.[2a]

This problem presents two separate questions: (1) does the acquisition of an already integrated system of separately existing carriers require Commission approval under subdivision 2 of section 5; and (2) if it does, may the Commission proceed to regulatory determinations, deferring meanwhile the question of whether it will authorize the continuation of this control, upon which its jurisdic-

tion over Alleghany depends. The second question becomes more pointed where, as here, the assumption of regulatory responsibility by the Commission shields the person guilty of the unapproved acquisition from regulation by another agency.

With respect to the first question, until this case arose, it had been the consistent view of the Commission that its approval of such an acquisition of control and its finding of consistency with the public interest was required. *Arkansas & L. M. Ry. Co.-Control,* 281 I. C. C. 254; *Weinstein-Control-Capital Transit Co. and Montgomery,* 56 M. C. C. 127; *Seaboard Air Lines Ry. Co.-Receivership,* 261 I. C. C. 689. This view was well expressed by Division 4 in its opinion with respect to Alleghany's application for authority to merge one of the Central's subsidiaries, the Louisville & Jeffersonville Bridge and Railroad Company, 290 I. C. C. 723, 732-4.[2b] The full Commission departed from this position and held to the contrary. 295 I. C. C. 11, .[3] We reversed the Commission holding[4] and we in turn were reversed upon other grounds. The Supreme Court left the question open.[5]

Without going into the question of whether our previous determination in this regard remains the law of the case we express afresh our conclusion that such approval is required. The statute unequivocally requires Commission approval for the acquisition of two or more carriers by any person. It reads:

> "It shall be lawful, with the approval and authorization of the Commission • • • for a person which is not a carrier to acquire control of two or more carriers • • • ". (§ 5[2][a]).

Its language does not suggest any exceptions and certainly none on the basis of common control by someone else having been previously authorized. It seems to us that as long as the carriers remain unmerged and unconsolidated, the Commission has full power and the duty to decide whether control of them all or any of them by the proposed new person is in the public interest. This was the un-

challenged prior consistent administrative interpretation by the Commission.[6] The full reasons for our holding were expressed in our earlier opinion at 134 F. Supp. 132, 142, and in Appendix II to our per curiam opinion at 138 F. Supp. 123, 137. We reaffirm them. We believe our view is strengthened by the emphasis in the Supreme Court's opinion upon the importance of keeping sight of the individual entities within the system (353 U. S. at p. 170).

If our conclusion in this regard is to stand, subdivision 4 of section 5 provides in emphatic terms that Alleghany's unauthorized seizure of control of the Central and its subsidiaries was unlawful and that its continued control of these carriers is unlawful as well.

Subdivision 7 of that section mandates action by the Commission to compel correction of violations of this particular subdivision, once the facts are known. It provides:

> "The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). *If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation.* The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2) and (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by another person." (Emphasis added).

Ordinarily, if the facts were less conclusive, the Commission would commence its own investigation which would proceed concurrently with the investigation concerning Alleghany's application. Here, however, there is no question of further investigation; the facts are undisputed; the Commission's findings are complete.[7] This point was inescapable because

the Commission's power to pass upon the issuance of stock by Alleghany which it exercised depended upon the fact that Alleghany controlled the New York Central system. The question is simply one of law. The Commission, after reversing Division 4, proceeded to the merits of Alleghany's various applications, on the assumption that Alleghany's control of the carriers in question was lawful. This view was erroneous.

Under these circumstances, should authorization of the issue of stock be permitted to stand? We do not see how the adequacy of the security of the new preferred could be calculated until this question is resolved or at least considered. Alleghany's investment in the Central system, as last shown in the record, was $14.7 million, over ¼ of its total portfolio.[8] As long as Alleghany's control of Central is unapproved, it is subject to injunction, divestiture and other sanctions.[9] The effect of this cloud upon the value of the stock is a matter for expert consideration rather than our speculation. In the absence of compelling reasons to the contrary, as to which no findings were made,[10] authorization of continued control should logically be determined before the stockholders act upon the proffered exchange and before the stock becomes available for sale to the public, not afterwards. To say the least, it would be arbitrary to authorize the issue without even considering the effect of divestiture upon the value of this important asset as long as that action remains a possibility. Reconsideration by the Commission for that purpose is therefore necessary. The Commissioner's duty under section 20(a) is for the protection of investors as well as persons dependent upon transportation.[11]

Neither do we see how an order for the private benefit of Alleghany may be said to be in compliance with the Act when Alleghany's status under the Act and sole basis for claiming to be entitled to this relief, or any relief under the Act, is that of a wrongdoer in unlawful control of a group of carriers. Here there is no finding of public advantage to be gained from granting Alleghany's application. Unlike the status order which made available to the Commission infor

mation for the protection of the public or even the merger of the Bridge Company which was expected to produce operating economies of ultimate value to the public, the present order is unaccompanied by any finding of fact which would suggest a rational basis for action in advance of an investigation into the legality of Alleghany's acquisition of control. Here an investment company has been barred from issuing the stock in question by the Securities and Exchange Commission. In violation of the Interstate Commerce Act it has obtained control of a group of carriers. Solely upon the basis of this violation it now claims the advantage of less rigidly restricted financing which the Investment Company Act intended only for a person who had previously satisfied the Interstate Commerce Commission that his control of a carrier would be consistent with the public interest. The Interstate Commerce Act was never intended as a source of relief for a person in illegal control of a carrier. Such a person might be subject to all the burdens and duties imposed by the Act upon a person in legal control, but relief or benefit for such a person may not be rationally authorized under the Act, except upon finding that the public interest required such authorization notwithstanding that person's violation of the Act. In the absence of any finding that immediate action is needed in the public interest, as distinguished from the private interest of Alleghany, the stock authorization should await an appropriate application for approval of its control.

Further, reconsideration by the Commission is required because, once the error of law is recognized, the Commission's action would be in arbitrary conflict with its own settled policy, to compel prompt application for approval of acquisition of control where required under the statute, a conflict with which the Commission was not faced so long as it believed approval of acquisition of an integrated system unnecessary. It has consistently denied relief sought by those in illegal control[13] and usually compelled divestiture[13] except where it has found continuation of the control clearly in the public interest and, in most cases, that the failure to request approval was in good faith[14] due to an

oversight. Reopening of the Commission proceeding is necessary so that the Commission may give consideration to such findings here.

Finally, for even more fundamental reasons this order must be set aside. Although the Supreme Court has eliminated all doubt as to the Commission's jurisdiction—its power to decide the question here presented—it has not excused it from the need for making this decision, and making it in a logical sequence with respect to other regulatory decisions. The sequence of Commission determination may not be in arbitrary and capricious disorder; it must have a rational basis just as each order must in itself have such a basis. The approval of acquisition and continued control is an obvious first question in any application by Alleghany because unless the Commission intends to approve this control it would be regulating a company which should be properly under the control of another agency; it would be granting a wrongdoer sanctuary from the Investment Company Act; and it would be authorizing and ordering acts in aid of a known violation of the Interstate Commerce Act. The ultimate crucial result of such temporizing would be that by granting seemingly innocuous piecemeal applications, it would unobtrusively foreclose itself from any realistic determination of the fundamental question, because after the passage of time the disruption of the carriers in the system and of the public service, caused by divestiture, would be so great that it would necessarily be discarded as a practical alternative.[15]

We have been confronted with the claim that our view is inevitably inconsistent with that of the Supreme Court because otherwise it would not have left undecided the question of whether Commission approval was required with respect to a system of carriers already under common control. We see no reason why the Supreme Court, once it had faced and decided the basic question of conflicting claims of two great administrative bodies, to jurisdiction, should be presumed to have followed to the bitter end

every possible ramification of the claims of the private litigants. The holding of the Court did no more than establish the jurisdiction of the Commission and the validity of the status order.[16] The Court dealt with measures it believed necessary to protect the public from evasion of the Act by a possible wrongdoer. It did not suggest that the wrong be overlooked or that in the absence of any finding that the public interest compelled such action,[17] relief be granted for the benefit of the wrongdoer notwithstanding his wrong.

We have now recognized the Commission's jurisdiction. This unquestionably includes the power to authorize the issue of preferred stock in question but we hold that although there might be circumstances when such action could reasonably be taken before approving the acquisition of control over the Central system, there were no findings of facts which justify such action in the present case.

Accordingly, judgment must be granted in favor of plaintiffs. A judgment will be entered setting aside the order of the Commission authorizing the issue of the preferred stock and enjoining acts of the defendants in furtherance thereof. Defendants may apply for a thirty day stay of enforcement to enable them to perfect an appeal to the Supreme Court. The preliminary injunction in its present form shall continue until further order of the Court.

Settle order on notice.

CHARLES E. CLARK
U. S. C. J.

E. J. DIMOCK
U. S. D. J.

LAWRENCE E. WALSH
U. S. D. J.

Dated: September 27, 1957.

FOOTNOTES

[1] Briefly the history of this proceeding is as follows:

Mar. 2, 1955—Division 4 of I. C. C. ordered that Alleghany be considered as a carrier subject to its regulation. 290 I. C. C. 725.

Apr. 6, 1955—Plaintiffs, in a related action, *Breswick* v. *Briggs*, sought injunction of present stock issue. The application was denied to permit I. C. C. to give prior consideration to plaintiffs' claim. 130 F. Supp. 953.

May 24, 1955—Full Commission affirmed Division 4's holding as to status. 295 I. C. C. 11.

May 26, 1955—Division 4 approved present stock issue.

June 6, 1955—Present action commenced by plaintiffs. No application was made for temporary injunction pending final disposition by I. C. C.

June 22, 1955—Full Commission denied reconsideration of order authorizing stock issue. Notwithstanding plaintiffs' application for a stay the order was made effective immediately.

June 23, 1955—This order was made public but notice thereof was not given plaintiffs. Alleghany immediately commenced issuance of the stock pursuant to the authorization of the Commission.

June 23, 1955—Plaintiffs, having learned of the Commission order after two-thirds of the stock had been issued, obtained a restraining order staying transactions with respect to the stock pending disposition of this proceeding.

July 21, 1955—A preliminary injunction was granted by this Court (Hincks, C. J. dissenting). 134 F. Supp. 132.

Aug. 3, 1955—The preliminary injunction was stayed by Mr. Justice Harlan as to that part of the stock issued before this Court's restraining order was granted. 75 S. Ct. 912.

Nov. 18, 1955—Enforcement of the I. C. C. order and issuance of the stock was permanently enjoined,

it being held that the Commission was without jurisdiction over Alleghany. 138 F. Supp. 123. Frank, C. J. had replaced Judge Hincks as a member of this Court. This Court stayed the injunction pending appeal. The preliminary injunction, as modified by Mr. Justice Harlan, was continued.

Apr. 22, 1957—Supreme Court reversed our holding but declined to vacate the preliminary injunction, remanding the case for consideration of claims not previously considered as to the failure of the Commission's order to comply with the Interstate Commerce Act. 353 U. S. 151.

June 14, 1957—An application to this Court to vacate the preliminary injunction was denied. Chief Judge Clark had replaced the late Judge Frank as a member of this Court.

[1a] The scope of the remand was stated as follows, 353 U. S. at p. 175:

"For all these reasons, the judgment of the District Court must be reversed and the case remanded for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act. * * *"

[2] The Supreme Court held that jurisdiction could be based upon its unapproved acquisition of control as well as approved. (353 U. S. at pp. 161-2). It said:

"The District Court held that whatever control Alleghany had over Central did not fit within the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' because the Commission had not given the approval necessary for acquisition of control of Central and its subsidiaries, 'two or more carriers.'

"The Commission and Alleghany contend that Commission approval of the acquisition of a single, integrated system is not necessary. We need not decide this question, however, and intimate no opinion on it, for even if such approval is necessary, the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' refers to 'control' and not to 'approved control.' There seems to be no reason to read in the word 'approved'. Such a holding would mean that the failure of a company engaging

in a transaction requiring Commission approval to apply for that approval would deprive the Commission of jurisdiction. Remedies against a violator are provided by § 5(7), (8), and (9) of the Act. To punish a violator by depriving the Commission of jurisdiction over it would be indeed quixotic. As the Commission points out, the problem would appear clearer were Alleghany contesting, rather than acquiescing in, its jurisdiction."

[2a] Inasmuch as the full Commission believed its approval unnecessary this was a matter considered only by Division 4. See *Louisville & J. B. & R. Co., Merger,* 290 I. C. C. 725, 733, 741, 746. These findings are also printed in the Record on Appeal to the Supreme Court, *Alleghany Corp.* v. *Breswick & Co.*, (353 U. S. 151). See pp. 425, 435, 441-2. The finding of consistency with the public interest, insofar as it related to control was restricted to the properties and franchises of the Louisville & Jeffersonville Bridge and Railroad Company, 290 I. C. C. 725, 747; Record, op. cit., p. 443.

[2b] Record, op. cit., pp. 425-7.

[3] Its opinion has not yet been bound. It may be found in the Record on Appeal to the Supreme Court, Record, op. cit., pp. 506-515. The brief discussion of the subject occurs at p. 512.

[4] 134 F. Supp. 132, 143-44; 138 F. Supp. 123, 137-38.

[5] 353 U. S. at p. 161.

[6] In *Louisville & J. B. & R. Co. Merger,* 290 I. C. C. 725, 733, Division 4 said:

"The Central system includes many individual carriers which are controlled by Central through stock ownership or otherwise. We long have recognized under section 5, that railroad systems are comprised of 2 or more carriers, and that control of a single system may not lawfully be effectuated without our approval and authorization. [Citing *Seaboard Air Line Ry. Co. Receivership,* 261 I. C. C. 689, 717. *New York S. & W. R. Co. Reorganization,* 282 I. C. C. 801 (not printed in full). *Arkansas & L. M. Ry. Co. Control,* 282 I. C. C. 254, 260. *Weinstein-Control-Capital Transit Co. and Montgomery,* 56 M. C. C. 127, 131. *Stoughton-Control-Delaware Coach Co.,* 57 M. C. C. 456. *Kittrell-Control-Dixie Motor Coach Corp.,* 37 M. C. C. 91.] That principle is considered basic, almost as a definition. So much so, that the question of acquisition of a carrier system has never been contested before the Commission, and as far as we know, there have been no court decisions touching on that issue. Nevertheless, because of the stress which Alleghany places on this point, some discussion thereof is necessary."

[6] In earlier stages of the litigation defendants have expressed fear that injecting the Commission into proxy contests would unduly interfere with stockholder suffrage. As we pointed out in an earlier opinion, 134 F. Supp. 132, 144, although this concern might have relevance where control was acquired other than by the acquisition of a controlling block of corporate stock by a single person, or a small concerted group of persons, there were no findings that such was the case here. On the contrary, a significant part of the Commission's regulation of Alleghany has concerned the acquisition of such a block of Central's stock and coordinated activities of Alleghany's officers as individual stockholders of Central. See *Chesapeake & O. Ry. Co.-Purchase*, 271 I. C. C. 513 (1948).

[7] The findings are to be found in *Louisville & J. B. & R. Co. Merger, supra.*, 290 I. C. C. 725, at pp. 733, 741, Record, op. cit., pp. 425, 435. (Division 4) and 295 I. C. C. 11, , Record, op. cit., pp. 511-12, 513 (full Commission).

[8] The schedule of Alleghany's investments as of December 31, 1954 was as follows (Record, op. cit., p. 166):

	Cost	*Indicated Market Quotations*
New York Central Securities ..	$ 6,918,118	$ 9,607,800
Alleghany share of joint ventures in Central investments (See Note (3) Record p. 169)	7,500,000	10,050,000
	$14,418,118	$19,657,800
Total investments	$33,342,393	$67,944,633

[9] As to carriers, the usefulness of these assets may also be subjected to other restrictions. See *Bonds of St. Louis-S. F. Ry. Co.*, 150 I. C. C. 139 (1928), in which an unapproved acquisition by a carrier was held to be not capitalizable. The extent to which analogous restrictions might apply to the financing of a person not a carrier is a matter for consideration by the Commission.

[10] The only findings of possible significance in this regard are that the plan was a further step in a program initiated eight years earlier, in September, 1946; that it will eliminate dividend arrearages and give the preferred stockholders an opportunity to participate in the "progress of the applicant". Record, op. cit., pp. 528-530. Contrast the findings by Division 4 as to why Alleghany should be required to report as a carrier notwithstanding the illegality of the manner by which it obtained its status. *Louisville & J. B. & R. Co. Merger, supra.*, 290 I. C. C. 725, at p. 741.

[11] While the dominant purpose of § 20(a) was to ensure sound railroad financing in the interest of the proper development of our transportation system, an important related aim was "to protect the investing public against the dissipation of railroad resources through faulty or dishonest financing". (Sharfman, The Interstate Commerce Commission, Vol. I, pp. 189, 190).

Throughout the history of this legislation, there was universal recognition of the interrelation of sound railroad financing and the protection of investors, the latter being essential to maintaining confidence in railroad investment. 58 Cong. Rec. 9160, 9163 (66th Cong., 1st Sess.); Sharfman, The Interstate Commerce Commission, pp. 190-191 (1931).

> "* * * If the people who have money will not invest it in the transportation enterprise, private ownership and operation under public control must necessarily fail. It is apparent, therefore, that any legislation which may be proposed upon the hypothesis of private ownership and operation must tender to the future investor reasonable security for the investment he is asked to make and reasonable assurance of such yearly return upon his money as will induce him to enter the field." -Senate Report No. 304, 66th Cong., 1st Sess. (1919).

See also testimony of Commissioner Clark, Hearings before the Senate Committee on Interstate Commerce on Extension of Tenure of Government Control of Railroads, Vol. I, p. 343 (1919); The New England Investigation, 27 I. C. C. 560, 616 (1913); Matter of Consolidations & Combinations of Carriers, 12 I. C. C. 277, 306 (1907); see also 21st Annual Report of Interstate Commerce Commission, p. 24 (1907).

In 1913 and 1916, the House of Representatives passed legislation which substantially incorporated the provisions of the present § 20(a). The House Reports on these bills indicate recognition of the fact that one of the aims of the statute was to protect investors from the abuses of speculative financing. H. R. Report No. 681, pp. 3, 4 (63rd Cong., 2d Sess., 1914); H. R. Report No. 349, pp. 8, 9 (64th Cong., 1st Sess., 1916). This was made explicit by a question addressed to Mr. Rayburn, a member of the House Committee on Interstate and Foreign Commerce, during debate on the 1913 bill:

> "Mr. McKenzie: Is it not one of the main purposes of this bill to give stability and value to railroad stocks and bonds for the protection of the men and women who invest their money in these stocks and bonds in good faith, so that the rate to be charged by the railroads is not the only material fact in the bill?

> Mr. Rayburn: It [the rate charged] is not; but the gentleman's question answers itself and answers it much better than I can, and I thank him for it." 51 Cong., Rec. 9687 (63rd Cong., 2d Sess., 1914).

By exempting carrier securities from any states or Securities and Exchange Commission regulation, Congress has given further evidence that it looks to the I. C. C. to protect the welfare of investors in considering stock issues under § 20(a). It is impossible to believe that Congress could have intended investors in carrier securities to be left without any of the protections afforded other investors. When Congress exempted corporations like Alleghany from compliance with the provisions of the Investment Company Act, it manifested no intent to deprive stockholders in such companies of the safeguards provided for other investment companies, but merely an intent to avoid dual regulation.

In this regard we modify the view we expressed in our earlier opinion, 134 F. Supp. 132, 140, footnote 9, in which we said:

> "The I. C. C. control with respect to the issuance of securities is merely to protect against over-issue, not to hold the balance between management and investor."

This was an overstatement; its emphasis upon the Commission's primary responsibility neglected the secondary duty to protect public investors.

[12] It is the practice of the Commission when an application discloses an underlying violation of section 5 to commence its own investigation into the violation which is conducted concurrently with the investigation of the application. In the absence of exceptional circumstances the application will be denied and divestiture ordered. Cases in which applications for merger were denied because of prior unauthorized control are: *Gisinger-Investigation of Control*, 60 M. C. C. 321, 327 (1954); *Transcontinental Bus System, Inc.-Inv. of Control* (Arkansas Motor Coaches), 57 M. C. C. 323 (1951); *Pacific Greyhound Lines-Control and Merger*, 56 M. C. C. 415, 434, 440 (1950); *Hodge-Control*, 40 M. C. C. 499 (1946). In *Gisinger-Investigation of Control, supra.*, 60 M. C. C. 321, 327, 329 (1954) it was said:

> "The application in this proceeding is in effect a request for validation of the existing unlawful control. The merger of the properties is merely a second step to change the form of the control already unlawfully in effect. The act contemplates that consideration be given to 'proposed' transactions under section 5. Although it has been stated that such violations of section 5 are not an absolute bar to approval, each case must be considered on its merits • • • ". (327)

• • •

"• • • In effect, applicants would have us ignore the unlawful control which has now continued for some years, and authorize the merger on the basis of the evidence presented, which is largely based on the unlawful control and the operations thereunder and directed primarily to the merger. The real issue is whether the common control of these carriers should be sanctioned under the circumstances presented. In our opinion, this record shows such a flagrant disregard for the law that divestiture should be ordered". (329).

Cases in which the Commission has refused to approve purchases of stock for this reason are: *Kolowich-Control*, 58 M. C. C. 599, 609 (1952); *Welch-Control*, 56 M. C. C. 505 (1950); *Mooney-Control*, 56 M. C. C. 771 (1950); *Pacific Greyhound Lines-Control and Merger, supra.*, 56 M. C. C. 415, 434 (1950); *Casser-Investigation of Control*, 57 M. C. C. 53, 67 (1950) and 55 M. C. C. 696 (1949); *Hodge-Control, supra.*, 40 M. C. C. 499 (1946); *Manlowe-Control*, 45 M. C. C. 125 (1946). Cases denying applications to transfer operating rights for this reason are: *Interstate Motor Freight System-Purchase*, 65 M. C. C. 37, 53 (1955); *Myrick-Purchase*, 57 M. C. C. 1 (1950); *Jones-Purchase*, 57 M. C. C. 105 (1950); *Texas, New Mexico & Oklahoma Coaches, Inc.-Purchase*, 55 M. C. C. 269 (1948); *Congdon-Purchase*, 50 M. C. C. 781 (1948); *McRae-Purchase*, 45 M. C. C. 633 (1947); *Mitchell-Purchase*, 40 M. C. C. 283 (1945); *Tornetta-Purchase*, 40 M. C. C. 339, 343 (1945).

Similarly, it has refused to approve an issue of securities for the purpose of financing an unapproved acquisition. *Bonds of Chesapeake & O. Ry. Co.*, 150 I. C. C. 257, 259-60 (1929).

[13] Denial of applications is usually accompanied by compelled divestiture, although sometimes left to be accomplished voluntarily or by subsequent proceeding. Divestiture was ordered in *Gisinger-Investigation of Control; Transcontinental Bus System, Inc.-Inv. of Control; Pacific Greyhound Lines-Control and Merger; Myrick-Purchase; Kolowich-Control; Mooney-Control; Casser-Investigation of Control; McRae-Purchase; Manlowe-Control;* op. cit.

[14] In *Casser-Control-Bingler Vacation Tours, Inc.*, 57 M. C. C. 53, 67, the Commission said:

"• • • and we have given our approval to concluded transactions under that section [§ 5] only in comparatively rare instances where the parties had acted in entire good faith, appropriate applications were filed promptly upon apprisal of the unlawfulness, and the transaction clearly was consistent with the public interest";

The fact that the applicant was in good faith unaware of the illegality, is a significant consideration. *Coast Lines Truck Service,*

Inc.-Control and Merger, 58 M. C. C. 115, 131 (1951); *Consolidated Truck Lines-Control and Merger*, 57 M. C. C. 277, 281 (1951); *Sims-Purchase*, 40 M. C. C. 228, 230 (1945). In some cases applications have also been granted because there is a strong public interest in continuance of service which might be disrupted if divestiture were ordered; in other words, the violation is tolerated in the interest of the public, not out of consideration for the violator. *Baggett-Control*, 65 M. C. C. 522, 525 (1955); *Potomac Coach Lines, Inc.-Purchase*, 57 M. C. C. 199, 207 (1950); *Capitani-Control*, 57 M. C. C. 413, 420 (1951); *Bowman-Control*, 55 M. C. C. 802 (1949); *Commercial Petroleum and Transport-Control*, 58 M. C. C. 439, 459 (1952); *Lee-Control*, 50 M. C. C. 163, 168 (1947). Cf. *Cochrane-Purchase*, 40 M. C. C. 233, 237 (dissenting opinion) (1945).

[15] Although the Commission consistently points out that an illegal acquisition does not become protected by the passage of time or the prior knowledge of the Commission or its grant of other applications, (see *Transcontinental Bus System, Inc.-Inv. of Control, supra.*, 57 M. C. C. 323, 334), there is no doubt that the disruption of the public service by delayed divestiture will weigh against the exercise of this sanction. See *Commercial Petroleum & Transport Co.-Control, supra.*, 58 M. C. C. 439, 459.

[16] The plaintiffs were held not to be interested parties for the purposes of being heard before the entry of the merger and status orders. 353 U. S. 151, 173, 175.

[17] Cf. Division 4 findings, *Louisville & J. B. & R. Co. Merger, supra.*, 290 I. C. C. 725, 741; Record, op. cit., p. 435.

Final Judgment

[Same Title]

This action to enjoin and set aside certain orders of the Interstate Commerce Commission authorizing Alleghany Corporation to issue certain stock and to enjoin Alleghany Corporation, having come on for final hearing, on remand from the Supreme Court of the United States, on September 5, 1957, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325 of Title 28 of the United Code, consisting of the undersigned judges; and the court having considered the pleadings, evidence and the briefs and having heard the arguments of counsel for the respective parties, and being fully advised in the premises; and on September 27, 1957 having filed its opinion herein containing its findings of fact and conclusions of law; now, in accordance with said opinion, findings and conclusions, it is

Ordered, Adjudged and Decreed that the orders of the Interstate Commerce Commission, dated May 26, 1955 and June 22, 1955, entered in Finance Docket No. 18866, authorizing Alleghany Corporation to issue (a) not exceeding 1,367,440 shares of 6% convertible preferred stock, par value $10 a share, to be offered to the holders of its cumulative 5½% preferred stock, Series A, par value $100 a share, in exchange, on the basis of 10 shares of 6% convertible preferred stock for each share of cumulative 5½% preferred stock, Series A, and (b) not exceeding 14,768,352 shares of common stock, par value $1 a share, upon conversion of such 6% convertible preferred stock on the basis set forth in the application of Alleghany Corporation and the report of the Interstate Commerce Commission, be and they hereby are enjoined, set aside, annulled and suspended; and it is

Further Ordered, Adjudged and Decreed that Alleghany Corporation, its transfer agents, officers, directors,

servants and employees, be and are hereby enjoined from taking any steps in connection with or in furtherance of the issuance of said 6% convertible preferred stock in exchange for said 5½% preferred stock, or for any other purpose, or the transfer thereof, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the enforcement of this judgment and the injunctions issued herein, subject to the exception stated in the next paragraph, is hereby suspended for a period of 30 days from the date hereof to permit any defendant or defendants in this action to file notice of appeal to the Supreme Court of the United States from this judgment and the injunctions contained herein, and upon the filing of said notice of appeal by any defendant in this action, the enforcement of this judgment and the injunctions contained herein shall be further suspended until the issuance of the order of this court upon the mandate from the Supreme Court of the United States, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the stay pending appeal provided by the foregoing paragraph, except to the extent provided in the next paragraph, shall not apply to so much of said judgment and injunctions as is directed to Alleghany Corporation, its transfer agents, officers, directors, servants or employees, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that, despite the provisions of the last preceding paragraph, the stay provided by the paragraph last but one shall apply to said judgment and injunctions to the extent that they enjoin Alleghany Corporation, and its transfer agents, officers, directors, servants or employees from transferring the 900,000 shares of 6% convertible preferred stock delivered prior to the stay granted by Mr. Justice Harlan on August 3, 1955 in connection with the previous appeal herein.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to apply to the court at any time upon the expiration of the stay provided herein for such further orders and directions as may

be necessary or appropriate for the construction or carrying out of this Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

Dated: New York, N. Y.
October 17, 1957.

CHARLES E. CLARK
U. S. C. J.

E. J. DIMOCK
U. S. D. J.

LAWRENCE E. WALSH
U. S. D. J.

Opinion

This report will not be printed in full in the permanent series of Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET No. 18866

ALLEGHANY CORPORATION STOCK

Submitted April 14, 1955 *Decided May 26, 1955*

Authority granted to issue not exceeding (a) 1,367,440 shares of 6-percent convertible preferred stock, par value $10 a share, to be offered to the holders of applicant's cumulative 5½-percent preferred stock, series A, par value $100 a share, in exchange, on the basis of 10 shares of 6-percent convertible preferred stock for each share of cumulative 5½-percent preferred stock, series A, and (b) 14,768,352 shares of common stock, par value $1.00 a share, upon conversion of such 6-percent convertible preferred stock, on the basis set forth herein. Condition prescribed, and the order made effective 10 days from its date.

BURTON K. WHEELER and EDWARD K. WHEELER for applicant.

GEORGE BRUSSEL, JR. and JOSEPH B. HYMAN for interveners in opposition to the application.

RANDOLPH PHILLIPS, *pro se*, intervener in opposition.

DIVISION 4, COMMISSIONERS JOHNSON, MITCHELL, AND TUGGLE BY DIVISION 4:

The Alleghany Corporation, by an application filed February 18, 1955, applied for authority under section 20a of the Interstate Commerce Act to issue not exceeding 1,367,440 shares of 6-percent convertible preferred stock, hereinafter sometimes called 6-percent preferred stock, in connection with an exchange of such stock for shares of its cumulative 5½-percent preferred stock, series A, hereinafter sometimes called series A preferred stock, and to issue not exceeding 14,768,352 shares of its common stock, upon conversion of such 6-percent preferred stock. No representation respecting the application has been made by State authority. By order entered April 20, 1955, Breswick & Co., Lewis D. and John Gilbert, and Randolph Phillips, alleged stockholders of the applicant, were permitted to intervene in opposition to the application. These interveners requested that the application be assigned for hearing, but they described no evidence which they would produce if a hearing were assigned, and alleged no facts which would justify such assignment. In our opinion, no hearing is necessary to enable us to determine our decision upon the application.

The applicant was incorporated under the laws of the State of Maryland on January 26, 1929. It is authorized by its certificate of incorporation, as amended, among other things, to acquire by purchase, subscription, or otherwise, and to own, hold for investment, use, sell, assign, transfer, mortgage, pledge, exchange, or otherwise dispose of securities. Its holdings include the securities of certain railroad companies, including the New York Central Railroad Company.

By our order of March 2, 1955, in Finance Docket No. 18656 et al., *Louisville & Jeffersonville Bridge & R. Co. Merger*, 290 I. C. C. ——, we approved and authorized, among

other things, subject to certain conditions, merger of the properties and franchises of the Louisville & Jeffersonville Bridge & Railroad Company into the Cleveland, Cincinnati, Chicago and St. Louis Railway Company for ownership, management, and operation, and through the ownership of stock of the latter company, continuation of control of the properties and franchises of the former company by the New York Central Railroad Company and the Alleghany Corporation. The order further provided that unless and until otherwise ordered by this Commission, the Alleghany Corporation is to be considered as a common carrier subject to the provisions of section 20(1) to (10), inclusive, and section 20a(2) to (11), inclusive, of the Interstate Commerce Act, as amended, to the same extent that those provisions are applicable to the New York Central Railroad Company and its carrier subsidiaries and affiliates.

At a special meeting held on December 28, 1954, applicant's board of directors, hereinafter called the board, resolved that it was desirable that applicant's certificate of incorporation, hereinafter called the certificate, be amended to create 1,367,440 shares of a new class of stock to be known as 6-percent convertible preferred stock, par value $10 a share, convertible into shares of common stock, junior to the class of its $4 prior preferred convertible stock and senior to the existing class of preferred stock (of which the series A preferred stock is a series), and to its common stock, and to increase the authorized shares of common stock from 12,350,000 to 22,000,000 shares, so as to provide a sufficient number of shares into which such 6-percent preferred stock will be convertible. At a special meeting of applicant's stockholders held on February 8, 1955, as required by the certificate, the holders of two-thirds of the outstanding shares of $4 prior preferred convertible stock and of substantial majorities of the outstanding shares of series A preferred stock and common stock, voting as separate classes, approved the proposed amendments, and on that date appropriate articles of amendment of the certificate were filed with the State Tax Commission

of the State of Maryland. The certificate, as so amended, provides for a total authorized capital stock of 24,895,807 shares, comprised of 28,367 shares of $4 prior preferred convertible stock, without par value, 1,367,440 shares of 6-percent preferred stock, par value $10 a share, 1,500,000 shares of preferred stock, par value $100 a share, and 22,000,000 shares of common stock, par value $1 a share.

Pursuant to a resolution adopted by the executive committee of the board at a special meeting held on February 9, 1955, applicant proposes to issue, subject to receipt of our authorization not later than May 31, 1955, not exceeding 1,367,440 shares of the new 6-percent preferred stock in connection with an exchange of such stock for shares of its series A preferred stock, and not exceeding 14,768,352 shares of its common stock upon conversion of such 6-percent preferred stock, pursuant to an exchange offer dated February 10, 1955. Under such offer, the holders of applicant's outstanding series A preferred stock are given an opportunity to exchange their shares on the basis of 10 shares of 6-percent preferred stock for each share of series A preferred stock, subject to the approval of this Commission on or before May 31, 1955, and to the condition that 100,000 shares of series A preferred stock, or such lesser number as its board may deem sufficient to warrant consummation of the exchange offer, will be offered for exchange. The offer is open to all such holders until 3:30 p.m. eastern standard or daylight saving time, whichever is then in effect in the city of New York, on the closing date, which, under applicant's proposal, will be the fifth day (excluding Saturday, Sunday, and any legal holiday) after we have issued an order, substantially in the form requested, authorizing the proposed issue. Any holder of the series A preferred stock may accept the offer and deposit for exchange all or any number of full shares held by him. He may revoke his acceptance of the offer as a whole or in part and direct the return of the deposited stock, by written notice to the exchange agent, The Marine Midland Trust Company of New York, at any time prior to 3:30 p.m., on

the closing date. As soon as practicable after that date, if the required number of shares of series A preferred have been accepted by the exchange agent for exchange, the applicant will issue and deliver the required number of shares of 6-percent preferred stock in temporary form in accordance with the instructions set forth in the letter of transmittal accompanying the certificates surrendered. The applicant has reserved the right to extend the exchange offer for an additional period or periods. However, regardless of such possible extension or extensions, the conversion rights of the 6-percent preferred stock will be fixed as of the closing date and all shares tendered for exchange on or before 3:30 p.m. on that date will be exchanged as of such date. If the applicant determines not to consummate the exchange offer because less than 100,000 shares of series A preferred stock have been duly submitted for exchange or the requisite authority has not been granted by us on or before May 31, 1955, or if our order denies any material portion of the application or imposes terms or conditions which are not acceptable to it, the exchange offer will be void and the surrendered stock certificates will be returned to their respective owners. All exchanged shares of series A preferred stock will be retired. All costs and expenses of the exchange will be borne by the applicant except the expense incurred by the stockholders in delivering their stock to the exchange agent.

Of the series A preferred stock outstanding as of January 31, 1955, the chairman of applicant's board and his wife were the beneficial owners of 11,087 and 3,738 shares, respectively, and two other members of the board were beneficial owners of 12,959 and 500 shares, respectively. These holdings, aggregating 28,284 shares, represent approximately 20.7 percent of the 136,744 shares outstanding in the hands of the public. The application represents that these stockholders each has the present intention of tendering approximately the same proportion of their holdings of such stock, as compared with the total number of shares thereof then outstanding, as are tendered by other persons. However,

none of them has entered into any agreement with applicant, or is under any obligation to do so, each of them reserving the right to take whatever action may at the time be deemed desirable in his own interest under the circumstances existing at the time such stockholder makes his final decision. The three members of the board hereinbefore mentioned, as of January 31, 1955, were beneficial owners of 547,500 shares, or approximately 11.8 percent, of the 4,637,797 shares of applicant's common stock outstanding. Also, on that date, two of these directors and the wife of the chairman were beneficial owners of subscription warrants entitling them to purchase, in the aggregate, 241,940 shares of applicant's common stock at a price of $3.75 a share; and the chairman was the beneficial owner of options to purchase 100,000 shares of such stock at a price of $3.0625 a share.

If the exchange offer is consummated, the board intends, following the issuance of the 6-percent preferred stock, thereafter to commence the payment of dividends, if earned, with respect to all then outstanding shares of Series A preferred stock at the annual rate of $5.50 a share. It should be noted, however, that neither the dividend requirements of the series A preferred stock nor of the 6-percent preferred stock were earned from portfolio income in either 1953 or 1954. Because of the uncertainty as to the number of shares of series A preferred stock which may be surrendered, the board is not prepared presently to decide whether it will call for redemption the unexchanged shares or to what extent, except as hereinbefore stated, it will pay dividends on account of arrearages thereon.

The applicant has certain bank loans, two of which are evidenced by promissory notes, one to the Chase National Bank of the City of New York, authorized by our order of August 6, 1951, in Finance Docket No. 17423, *Alleghany Corporation Note*, 282 I. C. C. 807, and the other to The First National Bank of Boston, authorized by our order of September 3, 1952, in Finance Docket No. 17871, *Alleghany Corporation Notes*, 282 I. C. C. 817. The applicant has agreed, in connection with these two loans, as well as in the

indenture pursuant to which its 5-percent sinking-fund debentures, due November 1, 1962, authorized by our order of November 20, 1952, in Finance Docket No. 17937, *Alleghany Corporation Securities*, 282 I. C. C. 818, were issued, among other things, not to pay, without the consent of such banks and the holders of two-thirds of the aggregate principal amount of outstanding debentures, any cash dividends or other distribution on, or to purchase, redeem, or otherwise retire, any shares of its capital stock, except in exchange for other shares of its capital stock, if the aggregate amount expended therefor would exceed a particular sum as computed under prescribed formulas. Accordingly, should applicant decide to redeem unexchanged shares of series A preferred stock, such redemption might conceivably require the consent of such banks and debenture holders.

A description of each class of applicant's stock, with preferences, conversion and other rights of each class of the authorized stock, is set forth in the certificate.

The rights of holders of the 6-percent preferred stock and the series A preferred stock will be similar in many respects but there will be substantial differences as mentioned hereinafter. The 6-percent preferred stock is senior to the series A preferred stock and to the authorized but unissued preferred stock of which class the series A preferred stock is a series. The 6-percent preferred stock has a par value of $10 a share, whereas the series A preferred stock has a par value of $100 a share. When, and as declared by the board, the latter stock is entitled to cumulative dividends at the rate of 5½ percent per annum in preference to the common stock, whereas the 6-percent preferred stock is entitled to cumulative dividends at the rate of 6-percent per annum in preference to both the series A preferred and common stock. Dividends on the 6-percent preferred stock will be payable semiannually on April 1 and October 1, will be cumulative from May 1, 1955, and will begin October 1, 1955. The redemption value used in the conversion formula set forth below

takes into account the fact that dividends on the 6-percent preferred stock do not commence to accrue until a date which may be subsequent to issuance and is designed to compensate therefor. Regarding 10 shares of the 6-percent preferred stock as the equivalent of 1 share of the series A preferred stock for the purposes of liquidation, dissolution and/or redemption, there is no distinction in the amount payable (exclusive of dividend arrearages) to the holders of each class upon the happening of any of the aforesaid contingencies, except that payment will be made to the holders of the 6-percent preferred stock before any payment is made to the holders of the series A preferred stock. However, because the dividend arrearages on the series A preferred stock are substantial, the relative redemption values of each class are substantially different. The cash redemption value of 1 share of series A preferred stock on May 1, 1955, will be $237, whereas that of 10 shares of 6-percent preferred stock would aggregate $105, the difference of $132 representing accumulated and unpaid dividends. In the event of voluntary liquidation or dissolution of the applicant, or upon redemption, the holders of 6-percent preferred stock will be entitled to receive, before any payment is made to the preferred or common stockholders, $10.50 a share, and in case of involuntary liquidation or dissolution $10 a share, plus, in each instance, all dividends accumulated and unpaid thereon, whether or not earned or declared. Each share of series A preferred stock is in each such instance entitled to an amount (exclusive of dividend arrearages) equal to 10 times the equivalent amount set forth with respect to each share of 6-percent preferred stock. There is no restriction with respect to the repurchase or redemption of shares of either class of stock while there is any arrearage in the payment of dividends thereon, but the applicant, by the express terms of its certificate, is precluded from redeeming any shares of 6-percent preferred stock prior to May 1, 1970. There is no such time limitation with respect to the redemption of series A preferred stock. Neither class

of stock is entitled to preemptive rights. The series A preferred stock is entitled to the benefits of a sinking fund, the provisions of which are not operative at the present time because of accumulated dividends in arrears. In case of default in the payment of four quarterly installments of dividends on such stock, or the elapsing of 24 consecutive months during which applicant shall at no time have fully paid up all dividends thereon, such stock is entitled to elect two directors. Because of the default in the payment of dividends thereon, such stock is now entitled to elect two directors. There is no provision for a sinking fund for the 6-percent preferred stock. The holders thereof, voting as a class, have a right to elect two directors regardless of whether or not dividends are currently paid. The series A preferred stock is not convertible. The holder of each share of 6-percent preferred stock, at any time prior to 5 days before its redemption, will, upon payment to applicant of $3.75 per share of common stock into which such share is convertible, be entitled to convert such share into such number of fully paid and nonassessable shares of common stock, without adjustment for dividends in respect of either such share or the shares of the common stock into which it is converted, as shall be arrived at by dividing 23.7 (being 1/10 of the May 1, 1955 redemption price per share of series A preferred stock) by the difference between $3.75 and an amount equal to the closing price of the common stock on the New York Stock Exchange on the closing date of the exchange offer (or if no sale takes place on such date then an amount equal to the closing price on the last preceding day on which a sale is made). The result of such computation shall be computed to the nearest 1/10 of a share, provided, however, that in no event, regardless of the arithmetical result of such computation, shall any share of 6-percent preferred stock be convertible into more than 10.8 shares of common stock. At the time of the original issuance of the 6-percent preferred stock, the holders thereof will be advised by letter and by printed endorsement on the certificates represent-

ing such stock of the number of shares of common stock into which each share of 6-percent preferred stock is convertible upon payment of $3.75 per share of common stock. No fractional shares or scrip representing fractional shares will be issued upon such conversion. If the aggregate number of shares of 6-percent preferred stock surrendered for conversion at any one time by any one holder are convertible into a whole number and a fraction of shares of common stock, the number of shares of common stock issuable upon such conversion shall equal such whole number, and an amount equal to such fraction multiplied by the excess of the closing price on the New York Stock Exchange of the common stock on the effective date of such conversion (or if no sale took place on such date then the excess of the closing price on the last preceding day on which a sale was made) over $3.75 will be paid in cash by the applicant to such holder. In the event of any reclassification, exchange or other change of the common stock, or the declaration of or payment of any dividend in shares of stock of any class, the number of shares of common stock (and in the case of the declaration or payment of any dividend in shares of stock of any other class, the number of shares of stock of such other class) issuable on conversion of the 6-percent preferred stock will be adjusted accordingly.

The affirmative approval of the holders of a majority of the outstanding shares of series A preferred stock is required before applicant may issue any additional shares of such stock or of any other class of stock on a parity with or having priority thereover. The issuance of any shares of stock on a parity with or having priority over the 6-percent preferred stock, or the making of any material change in applicant's certificate or bylaws, with respect to the latter stock, requires the affirmative approval of the holders of two-thirds of the outstanding shares thereof. As of February 16, 1955, 144,544 shares of series A preferred stock, out of an authorized 1,195,000 shares, were issued, of which 7,800 were held in applicant's treasury and 136,744 shares were outstanding in the hands of the public, held by

approximately 1,186 stockholders. None of the 6-percent preferred stock has been issued.

The series A preferred stock and the common stock are listed on the New York Stock Exchange and applicant intends to make application to list on such Exchange the 6-percent preferred stock and the common stock into which such stock may be converted.

J. P. Morgan & Co. Incorporated, and Colonial Trust Company, both of New York City, have been named as transfer agent and registrar, respectively, of the 6-percent preferred stock.

Of the authorized common stock, 4,641,585 shares were issued and outstanding in the hands of the public as of January 31, 1955, held by approximately 15,120 stockholders, including 8 directors of applicant who were the beneficial owners of 578,846 shares; 410,032 shares were reserved for issue upon conversion of the presently outstanding $4 prior preferred stock, 1,999,700 shares were reserved for issue upon exercise of the presently outstanding common stock subscription warrants of the applicant, and 100,000 shares were reserved for issue upon exercise of previously granted options. Common stockholders have waived their preemptive rights as to the 100,000 shares reserved in connection with previously granted options, as well as to an additional 55,000 shares of common stock, to be sold to directors, officers and employees of the applicant upon exercise of options or otherwise, but such shares have not yet been sold, options covering them have not yet been granted, and such shares have not been reserved. Each holder of common stock is entitled to one vote for each share on matters on which such stock is entitled to vote, including the election of directors. There is no provision for cumulative voting of common stock. Upon liquidation or dissolution of the applicant, the holders of such stock will be entitled to share ratably in the assets remaining after payment of all amounts payable to the holders of the preference stocks. The holders of common stock are entitled to purchase ratably, according to their respective holdings, any

shares of common stock issued or sold for cash, and any stock purchase warrants or other option rights which may be issued giving the right to purchase shares of such stock for cash, in either case upon appropriate terms, but with certain designated exceptions, one of which includes any shares of common stock issued upon conversion of preferred stock convertible into common stock. Consequently, the shares of common stock proposed to be issued and sold upon conversion of the 6-percent preferred stock would not be subject to preemptive rights. The $3.75 which applicant will receive for each share of common stock issued upon conversion will be used for its general corporate purposes.

During January 1955, the high and low sales prices per share on the New York Stock Exchange of the series A preferred stock were $228 and $209.50, respectively, and of the common stock were $9.50 and $7.25, respectively.

As of January 31, 1955, there were issued and outstanding common stock subscription warrants of the applicant in bearer form, authorized by our order of November 20, 1952, in Finance Docket No. 17937, *Alleghany Corporation Securities, supra* entitling the owners thereof from time to time, without limitation as to time, to subscribe for and purchase 1,999,700 shares of the authorized but unissued common stock at a price of $3.75 a share, which shares have been reserved for such purpose. Such warrants do not entitle the owners thereof to any voting rights or other rights as stockholders of the applicant, and no dividend or interest is payable or accrues with respect thereto or to the shares of common stock which may be subscribed for and purchased thereunder until and unless, and except to the extent that, such warrants are exercised. These warrants are listed on the American Stock Exchange.

In September 1946, the applicant inaugurated a program of purchasing in the open market its own prior preferred convertible stock and series A preferred stock, and of presenting to the holders of those stocks a series of exchange offers and invitations for tenders with the object of benefiting the remaining holders of such preference stocks, and

eventually restoring an asset equity for the common stock. As a result of this program, the applicant has eliminated the prior preferred convertible stock from its capital structure and drastically reduced the amount of its series A preferred stock outstanding, has eliminated substantial amounts of dividend arrearages, and the capital deficit has been wiped out.

The proposed issue of 6-percent preferred stock would result in a further substantial reduction in the dividend arrearage on the series A preferred stock, and a subsequent redemption of the unexchanged shares of the latter stock would complete the elimination of such arrearage and place applicant's capital structure on a current basis for the first time in over 20 years. Applicant's management is of the opinion that the proposed exchange offer is in the best interests of applicant and the holders of all three outstanding classes of its stock. No dividends were paid on any class of its stock from May 1, 1931, through the year 1949, nor in 1953. Dividends of $2.50, $5 and $10 a share were paid on its prior preferred convertible stock in 1950, 1951, and 1952, respectively. A dividend of $4 a share was paid on its $4 prior preferred stock in 1954. The aggregate cash dividends paid in 1950, 1951, 1952 and 1954 were $89,567.50, $163,135, $303,470, and $103,380, respectively. Assuming a 100-percent exchange of series A preferred stock and that during the entire year 1956 there are issued and outstanding 25,845 shares of $4 prior preferred stock and 1,367,440 shares of 6-percent preferred stock, the aggregate dividend requirements for each class of such stock would be $103,380 and $820,464, respectively. Applicant expects its portfolio income during 1955 to be sufficient to meet the dividend requirements on all classes of its preferred stock. In addition, it expects to realize substantial income from the sale of securities, which income is also available for the payment of dividends.

The dividend accumulations on the series A preferred stock must be paid before dividends may be paid on the common stock. To the extent that the series A preferred stock is redeemed instead of exchanged, or dividend arrear-

ages thereon are paid in cash, applicant's assets will be reduced by the aggregate redemption price of the stock redeemed, and its income, derived from investments, may be reasonably expected to be reduced accordingly.

The conversion rights of the 6-percent preferred stock will afford the holders thereof an opportunity to participate in the progress of applicant, as reflected in the market value of its common stock. Although their existence will not have any immediate effect on the common stock, the exercise thereof will at that time have the effect of diluting the rights of the common stockholders, as such rights then exist. Assuming that the 136,744 presently outstanding shares of series A preferred stock are exchanged and the shares of 6-percent preferred stock are ultimately converted into common stock, and assuming closing prices of such common stock of $6 and $8.375 a share, there would be required to be issued 14,358,120 and 6,973,944 shares of common stock or about 75.6 and 60.1 percent, respectively, of all shares thereof outstanding upon giving effect to such conversion, for which applicant would receive an aggregate of $53,842,950 and $26,152,290, respectively, in payment for such shares (less such nominal sums as may be paid for fractional shares on conversion) which cash will be available for working capital and investment.

The short term effect of the exchange of series A preferred stock for 6-percent preferred stock will result in a substantial increase in the net asset value per share of applicant's common stock by reason of the elimination of arrearages on the series A preferred stock. The 6-percent preferred stock is not redeemable by the applicant until May 1, 1970, thereby precluding forced conversion for the period. Consequently, it is expected that at least until dividends are paid on the common stock, a substantial part of the 6-percent preferred stock will remain unconverted and outstanding. However, to the extent that the 6-percent preferred stock is converted into common stock, such conversions will tend to reduce the net asset value of the common stock if such value at such time exceeds approximately $4.50 a share.

The applicant's general balance sheet as of November 30, 1954, in which investments are shown at cost, less an adjustment reserve, shows the following items, among others:

Assets		
Total investments		$43,264,637
Current assets		8,256,621
Deferred assets		7,075
Unadjusted debits		1,362,699
Total assets		$52,891,032
Liabilities		
Capital stock		
$4 prior preferred convertible	$ 2,067,600	
Preferred	13,674,400	
Common	4,637,797	
Premiums on common stock	142,297	
Total stock		$20,522,094
Long-term funded debt unmatured		
Book liability	$21,200,000	
Reacquired and held in treasury	504,000	
Total long-term debt		20,696,000
Current liabilities		2,427,929
Deferred liabilities		2,050
Surplus—unearned	$106,976,335	
earned—appropriated	718	
earned—unappropriated (deficit)	97,734,093	
Total surplus		9,242,960
Total liabilities		$52,891,032

Another balance sheet statement of applicant as of the same date, but reflecting certain investments in securities at values based on market quotations on that date, shows total assets of $82,069,676 and total surplus $38,645,208. Its income statements for 1951, 1952, 1953, and the first 11 months of 1954 show net income, exclusive of profit and loss on security transactions, of $920,378, $861,652, $244,222, and $161,593, respectively. These statements also show that from the sale of securities applicant sustained a net loss of $605,037 in 1951, and gains of $50,806, $6,452,830, and $1,357,640 in 1952, 1953, and the 11-month period in 1954, respectively.

It is pointed out by applicant that on the basis of an exchange of 100,000 shares of series A preferred stock and redemption of the remaining 36,744 shares, the arrears of dividends thereon would be eliminated at a cost of about one-fourth the amount of cash that would be required to redeem all such stock, and if all the stock should be exchanged, the accumulated dividends would be eliminated entirely without the expenditure of any cash. The aggregate accrued dividends on such stock as of January 31, 1955, were $17,862,185 or $130.625 a share. Inasmuch as there is no dividend arrearage on the $4 prior preferred stock and dividends are currently being paid thereon, the 6-percent preferred stock would be entitled to receive dividends on a current basis.

Applicant has entered into an agreement, dated February 8, 1955, with Kidder, Peabody & Co., as dealer manager, whereby the latter agrees to use its best efforts to form and manage a group of securities dealers, including itself, to solicit acceptances of the exchange offer by holders of series A preferred stock. The soliciting dealers, including the dealer manager, will receive a commission of $1 for each share of series A preferred stock submitted through them to the exchange agent and exchanged in accordance with the exchange offer; provided, however, that the maximum aggregate commissions payable with respect to any single holder of record will be $300, except in certain cases

in which the stock is beneficially owned by others. The payment of such soliciting dealers' commissions is subject to the exchange offer being consummated. The dealer manager will be reimbursed for its out-of-pocket expenses up to $2,000, and if the exchange offer is consummated, it will receive the additional sum of $10,000, as a flat fee for its services and an amount equal to the aggregate commissions payable by it as dealer manager to the soliciting dealers, including itself, as provided in the agreement. The applicant will not solicit such exchanges. The dealer manager is not authorized to act as agent of the applicant and the soliciting dealers are not authorized to act as agents of the applicant or of the dealer manager.

The expenses to be incurred in connection with the proposed issue of 6-percent preferred stock, and common stock upon conversion thereof, cannot be estimated accurately at the present time because of the uncertainty of certain features of the transactions, including the number of certificates that will have to be handled. Certain other expenses, such as counsel fees, printing, and other items shown in the application are estimated at $70,580.

The proposed issue comes within exceptions (1) and (2) set forth in the Commission's report of May 8, 1944, in Ex Parte 158, *In Re Competitive Bidding in Sale of Securities*, 257 I. C. C. 129 (164), and competitive bidding is, therefore, not required in connection therewith.

Interveners allege that the exchange offer and the proposed issuance of securities are not for lawful objects within the corporate purposes of the applicant, are not compatible with the public interest, are unfair and inequitable to the holders of its common stock, and will result in unjust enrichment of the holders of the series A preferred stock; but, except to the limited extent mentioned below, their charges are lacking in particularity and are not supported by factual statements showing wherein the proposal is unlawful or unfair.

Interveners state that issue of stock as proposed will dilute the equity of the common stock and, as a result

thereof, holders of such stock will not receive a fair and just return on the present value of their investments. We have already pointed out that conversion of the 6-percent preferred stock will result in diluting the rights of the common stock. However, such fact does not make the proposal unfair, as compensating advantages, which have been described, will accrue to the common stockholders. The ultimate worth of the conversion rights, which holders of the series A preferred stock who accept the exchange offer will receive in partial satisfaction for the surrender of their rights to accrued and unpaid dividends, will be, of course, contingent upon the future value of the common stock. The immediate effect of the exchange of series A preferred stock for the 6-percent preferred stock will be to increase the net asset value of the common stock.

Interveners state that the common stockholders have not been protected by "arms-length bargaining" between persons owning or representing only common stock and owners or representatives of the other classes of securities affected by the transactions, and that the terms of the transactions have been imposed solely by management interests under the domination and control of the chairman of applicant's board of directors, whose total investment in series A preferred stock, with that of his wife, exceeds that in the common stock. A sufficient answer to this contention appears to be furnished by the fact that the charter amendment authorizing the issue and exchange of the 6-percent preferred stock was approved by the votes of holders of 3,269,217 shares of applicant's common stock, which constituted 70 percent of the total outstanding common stock and more than 97 percent of the common stock voted on such proposal. As of January 31, 1955, the directors of applicant owned 578,846 shares of common stock and the bulk of this (516,500 shares) was beneficially owned by its president, who owned only 12,959 shares of series A preferred stock. Based on high sales prices of these stocks in January, recited above, this person's investment in common stock was approximately 69 percent greater than his invest-

ment in preferred stock. In addition, he beneficially owned warrants entitling him to purchase 226,340 shares of common stock.

Other allegations of interveners raise questions as to the necessity of the proposed exchange, and they suggest that applicant should devote its available resources to the redemption and retirement of the series A preferred stock instead of making new investments and extending the risk of the common stock's equity. It is not our function to substitute our judgment for that of management, where the latter has exercised sound discretion and where as here the findings required by the statute as a condition to approval of the issue of securities properly may be made.

It does not appear that the proposed issue will adversely affect any carrier under the control of the applicant, or impair such carriers' ability to serve the public. Nor, with the modification hereinafter stated, does it appear that the proposal will be unfair or inequitable to any class of the applicant's stockholders.

In order to eliminate the possibility of manipulation of the common stock prices, with the object of influencing the conversion rights of the 6-percent preferred stock, and to make it possible for holders of the series A preferred stock to determine prior to the closing date of the exchange offer what the conversion ratio will be, our approval of the proposed issue of stock will be conditioned upon modification of the exchange offer so that, in lieu of the provision under which the conversion rights would be dependent upon the price of the common stock on a date subsequent to our order, the conversion ratio will be dependent upon the closing price of applicant's common stock on the New York Stock Exchange on the last day preceding the date of our order, or if no sale takes place on that day, on the closing price on the last preceding day on which a sale is made.

Subject to the foregoing condition, we find that the proposed issue by the Alleghany Corporation of not exceeding 1,367,440 shares of 6-percent convertible preferred

stock, par value $10 a share, and not exceeding 14,768,352 shares of common stock, par value $1 a share, upon conversion of the 6-percent convertible preferred stock, as aforesaid, is consistent with the proper performance of its service to the public by each carrier which is under the control of such corporation, that it will not impair the ability of any such carrier to perform such service, that it is otherwise consistent with the public interest, and that it (a) is for lawful objects within its corporate purposes and compatible with the public interest, which are necessary and appropriate for and consistent with the proper performance by such carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purposes.

An appropriate order will be entered, in which suitable provision will be made for submission of journal entries to record the transaction.

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 26th day of May, A. D. 1955.

FINANCE DOCKET No. 18866

ALLEGHANY CORPORATION STOCK

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

IT IS ORDERED, That, subject to the condition stated in the aforesaid report, the Alleghany Corporation be, and it is hereby, authorized to issue (a) not exceeding 1,367,440 shares of 6-percent convertible preferred stock, par value $10 a share, to be offered to the holders of its cumulative 5½-percent preferred stock, series A, par value $100 a share, in exchange, on the basis of 10 shares of 6-percent convertible preferred stock for each share of cumulative 5½-percent preferred stock, series A, and (b) not exceeding 14,768,352 shares of common stock, par value $1 a share, upon conversion of such 6-percent convertible preferred stock, on the basis set forth in the application and aforesaid report, the proceeds from the issue of such common stock to be used for general corporate purposes;

IT IS FURTHER ORDERED, That, except as herein authorized, said stock shall not be sold, pledged, repledged, or otherwise disposed of by the applicant, unless or until so ordered or approved by this Commission;

IT IS FURTHER ORDERED, That the applicant shall report concerning the matters herein involved in conformity with the order of the Commission, by division 4, dated August

9, 1946, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 C. F. R. 56);

IT IS FURTHER ORDERED, That the applicant shall submit for the consideration and approval of this Commission three copies of the journal entries required to record the transaction;

IT IS FURTHER ORDERED, That nothing herein shall be construed to imply any guaranty or obligation as to said stock, or dividends thereon, on the part of the United States; and

IT IS FURTHER ORDERED, That this order shall be effective 10 days from and after its date.

By the Commission, division 4.

HAROLD D. MCCOY,
Secretary.

(SEAL)

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 22nd day of June, A. D. 1955.

FINANCE DOCKET No. 18866

ALLEGHANY CORPORATION STOCK

Upon consideration of the record in the above-entitled proceeding, the petition filed June 2, 1955, by Breswick & Co., et al., requesting reconsideration of the report and order by division 4, filed and entered herein May 26, 1955, and applicant's reply to the petition; and

It appearing, That the alleged "Protective Committee for Common Stockholders of the Alleghany Corporation", which joined in the said petition and prayed for leave to intervene herein, is not a party of record and is not entitled to file a petition for reconsideration, and has not complied with the Commission's General Rules of Practice and the provisions of its order, by division 4, of August 9, 1946 (49 C. F. R. 56.3 (d)), relating to petitions for leave to intervene; and

It further appearing, That the material matters set forth in the petition were considered by division 4 and discussed in its report, and that the petition presents no facts or arguments which warrant reconsideration;

It is ordered, That all references to the said alleged protective committee contained in the petition be, and they are hereby, stricken therefrom; and

It is further ordered, That the said petition be, and it is hereby, denied, and that the said order of May 26, 1955, by division 4, shall be effective as of the date hereof.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX B

Relevant portions of § 5 and § 20a of the Interstate Commerce Act, as amended, 49 U. S. C. §§ 5 and 20a, read as follows:

Unifications, mergers, and acquisitions of control

§ 5(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise.

§ 5(2)(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers

by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

Non-carrier deemed carrier upon acquiring control

§ 5(3) Whenever a person which is not a carrier is authorized, by an order entered upon paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20 (1) to (10), inclusive, of this chapter, sections 304 (a) (1) and (2) and 320 of chapter 8 of this title, and section 913 of chapter 12 of this title, (which relate to reports, accounts, and so forth, of carriers), and sections 20a (2) to (11), inclusive, of this chapter, and section 314 of chapter 8 of this title, (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a of this chapter and of section 314 of chapter 8 of this title, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper perform-

ance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

Control effected by other than prescribed methods

§ 5(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

Investigation by Commission of effectuation of control by non-prescribed methods

§ 5(7) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such persons to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2) to (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person.

Jurisdiction of injunctions, etc., against violations of section or orders

§ 5(8) The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of the injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

Supplemental orders by Commission

§ 5(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate.

Issuance of securities; assumption of obligations; authorization

§ 20a(2) It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance

by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

Scope of commission's authority

§ 20a(3) The commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of paragraph (2) of this section.

Securities issued contrary to law void; effect; penalty

§ 20a(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization.

• • •

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
DEC 13 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

Nos. 616, 617 and 618

ALLEGHANY CORPORATION, *et al.*,
Appellants,
v.
BRESWICK & CO., *et al.*,
Appellees.

JOSEPH S. GRUSS, *et al.*,
Appellants,
v.
BRESWICK & CO., *et al.*,
Appellees.

INTERSTATE COMMERCE COMMISSION,
Appellant,
v.
BRESWICK & CO., *et al.*,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

GEORGE BRUSSEL, JR.,
141 Broadway,
New York 6, N. Y.,
Attorney for Appellees,
BRESWICK & Co. and MYRON NEISLOSS.

RANDOLPH PHILLIPS,
20 East 74th Street,
New York 21, N. Y.,
Appellee, Pro Se.

December, 1957.

TABLE OF CONTENTS

	PAGE
MOTION TO AFFIRM	1
Questions Presented	2
Preliminary Statement	3
ARGUMENT	8
I. The District Court correctly ruled that Congress under the standards of § 20a(2) prohibited the exposure of the public to the risks inherent in securities based on unlawfully acquired assets	8
A. Congress specifically amended the Interstate Commerce Act to prevent an Unauthorized Acquisition of Control of a Single System of "Two or More Carriers"	8
B. The District Court correctly ruled that the standards of § 20a(2) Prohibit the Issuance of Securities Based on Unlawfully-acquired Assets	16
C. There is no substance to appellants' contention that this Court excluded from the District Court's duties under the remand the determination of the § 5(2) question insofar as it was relevant to the issues under § 20a	24
II. If the Court accepts the present § 5(2) argument of appellants, fairness would require that last term's majority opinion of the Court be vacated, and the minority opinion adopted as the opinion of the Court	28

PAGE

III. Even assuming all of Alleghany's assets are lawfully held, there was a $20,600,000 shortage in assets for coverage of the quoted market values of Alleghany's securities at the time of the ICC's order 29

CONCLUSION 35

Appendix A: Chronology of ICC Proceedings ..... A 1

Appendix B: The events after close of the ICC Record ..... A 4

CASES CITED

Alleghany Corp. et al. v. *Breswick, et al.*, 353 U. S. 151 ..... 5, 11, 15, 19, 24, 25, 26, 27, 28, 29

Bonds of Chesapeake & Ohio Ry. Co., 150 ICC 257 .. 17, 22
Bonds of St. Louis San Francisco Co., 150 ICC 139 .. 6, 16
Breswick v. *Briggs*, 135 F. Supp. 397 35
Breswick & Co. v. *U. S.*, 138 F. Supp. 123 14

Chesapeake & Ohio Railway Co., Purchase 261 ICC 239 10
Chesapeake & Ohio Railway Co., Stock 254 ICC 653 32
Chicago Junction Case, 264 U. S. 258 ..... A 6
Commercial Motor Freight Inc., 10 Fed. Carrier Cases 430 31
Consolidation and Combinations of Carriers, 122 ICC 277 23

Ecker v. *Western Pacific R. Corp.*, 318 U. S. 448 23

F. P. C. v. *Colorado Interstate Gas Co.*, 348 U. S. 492 A 3

In the Matter of Alleghany Corporation, Investment Co. Act Release No. 2446 34

Louisville & Jeffersonville Bridge and Ry. Company Merger, 290 ICC 725 19

PAGE

Louisville & Jeffersonville Bridge & Ry. Company Merger, 295 ICC 11 19

M. H. Clarke, etc., Keshin Freight Lines, et al., 10 Fed. Carrier Cases 363 31

New England Coal, & Coke Co. v. *Rutland R. Co.*, 143 F. (2d) 179 23

Seaboard Air Line Ry. Co. Receivership, 261 ICC 689 ..... 23, 33

South Carolina Public Service Authority v. *S. E. C.*, 179 F. 2d 948 ..... A 6

U. S. v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 282 U. S. 311 ..... A 6

U. S. v. *Tucker Truck Lines*, 344 U. S. 33 ..... A 6

STATUTES CITED

Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1 et seq.

Preamble 23
Section 5(2) 13
Section 5(2)(a)(i) 9, 10, 28
Section 20a 5, 33
Section 20a(2) 21, 24, 26
Section 20a(11) ..... A 5
Section 20a(12) 13
Section 20b 23

Urgent Deficiencies Act, 28 U. S. C. 1336, 1337, 2321-2325 7

MISCELLANEOUS AUTHORITIES

Official Sale of Security Transactions and Holdings Vol. 21, No. 7, July, 1955 34
The New York Times, Nov. 16, 1957 19
The New York Times, Dec. 10, 1957 34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Nos. 616, 617 and 618

ALLEGHANY CORPORATION, et al.,
Appellants,
v.
BRESWICK & Co., et al.,
Appellees.

JOSEPH S. GRUSS, et al.,
Appellants,
v.
BRESWICK & Co., et al.,
Appellees.

INTERSTATE COMMERCE COMMISSION,
Appellant,
v.
BRESWICK & Co., et al.,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, BRESWICK & Co., RANDOLPH PHILLIPS, and MYRON NEISLOSS, appellees herein, move that the final judgment of the District Court be affirmed on the ground that its decision is correct and that the questions presented as grounds for these appeals are so unsubstantial as not to need further argument.

Questions Presented

Division 4 of the ICC ruled that Alleghany Corporation had acquired control of the New York Central Railroad System of 73 carriers in violation of § 5(2) of the Interstate Commerce Act. This finding was affirmed by the District Court which agreed that it was an "unchallenged prior consistent administrative interpretation" of the Statute. Under § 20a(2) the ICC may authorize issuance of new securities "*only if* * * * for some lawful object * * * and compatible with the public interest * * * and * * * reasonably necessary and appropriate for such purpose."

The questions presented are:

1. Was the District Court correct in affirming Division 4's finding that § 5(2) had been violated, and in ruling that the standards of § 20a(2) prohibited issuance of New Preferred and New Common Stocks based on the unlawfully-acquired assets? In enacting § 20a(2) did Congress permit the exposure of innocent future investors to the risks inherent in such unlawful assets?

2. Last term this Court ruled "We need not decide * * * and intimate no opinion" whether Alleghany Corporation violated § 5(2) of the Interstate Commerce Act, as such a decision was not necessary to affirmance of the ICC order dated May 24, 1955, which assumed jurisdiction over Alleghany pursuant to § 5(3). This Court then remanded to the District Court for decision the question as to whether another ICC order dated June 22, 1955, made in a different proceeding, approving issuance of securities under § 20a, violated the Act. Are appellants correct in stating that the District Court was required, as a result of this Court's prior decision, to exclude from its duties under the remand the determination of the § 5(2) question insofar as it was relevant to the issue under § 20a?

Statement

Appellants have concerted on a strategy of misstating the case by confusing two entirely separate issues. The question now presented was carefully left undecided by this Court last Term, and was expressly submitted to the District Court for its consideration on remand.[1]

This is an action brought by common stockholders of appellant Alleghany Corporation, a holding company controlling the New York Central Railroad System. Appellees sought to set aside two orders of the Interstate Commerce Commission believed to be injurious to the holders of common stock.

The first order dated May 24, 1955 (R. 506, 516)[2] assumed jurisdiction over Alleghany, pursuant to § 5(3) of the Interstate Commerce Act.[3] The second dated June 22, 1955 (R. 554) approved the issuance by Alleghany of new convertible preferred stock, pursuant to § 20a.[4]

Thus, this case initially raised two questions: Did the ICC have jurisdiction under § 5(3) and was its subsequent exercise of jurisdiction under § 20a proper? When the case was here last Term, this Court answered the *first* question in the affirmative, upholding the *first* order. It did not consider or pass on the second question or order. Instead, it remanded the cause for consideration of the second question —whether 'the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act'' (353 U. S. 151, 175).

---

[1] *Alleghany Corporation, et al.* v. *Breswick & Co., et al.*, 353 U. S. 151.

[2] Record references are to the printed record in Numbers 36 and 114, October Term, 1956.

[3] *Louisville & J. B. & R. Co. Merger*, 290 ICC 725; 295 ICC 11.

[4] R. 518-537.

Acting in precise compliance with this Court's mandate, the District Court proceeded to consider whether the Commission had exercised its jurisdiction properly when it approved Alleghany's preferred stock issue. It agreed with Division 4 of the ICC that Alleghany had acquired and maintained control of the New York Central system of 73 affiliated carriers in violation of § 5(2) of the Act, and it held pursuant to a continued and unbroken series of ICC precedents, which are unchallenged by appellants, that a § 5(2) violator could not lawfully issue securities under § 20a based on some $14,700,000 of these illegal assets, or obtain any other relief or benefits under the Act. The single exception to this doctrine was carved out by this Court in a 5 to 3 decision last Term, when it held that a § 5(3) order imposing ICC jurisdiction over Alleghany was proper even if a § 5(2) violation existed, since otherwise there would be the "quixotic" result of the agency losing jurisdiction over the violator.[5]

Acting squarely within the above legal principles and the terms of the remand, the District Court then held the stockholder invalid under § 20a.[6] In addition, the District Court left the door open to Alleghany to regularize its position by filing a § 5(2) application for control of the

---

[5] The Court said (353 U. S. at 161):

> "We need not decide this question, however, and intimate no opinion on it, for even if such approval is necessary, the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' refers to 'control' and not to 'approved control'. There seems to be no reason to read in the word 'approved'. Such a holding would mean that the failure of a company engaging in a transaction requiring Commission approval to apply for that approval would deprive the Commission of jurisdiction. Remedies against a violator are provided by § 5(7), (8), and (9) of the Act. To punish a violator by depriving the Commission of jurisdiction over it would be indeed quixotic."

[6] The opinion of the District Court is not yet reported but is set forth in Appendix A to the ICC Jurisdictional Statement. The final judgment of the District Court appears at Appendix B of the same statement.

New York Central system.[7] Hence the second question presented by this controversy, which this Court did not pass on last Term, is now here.

The fourth clause of § 5(2)(a)(i) of the Interstate Commerce Act requires the ICC to authorize the acquisition by a non-carrier (Alleghany) of two or more carriers, whether or not said carriers are part of a single established system (see ICC Jurisdictional Statement, App. D, p. 79). When this case was here last Term, this Court held that as a result of the 1954 proxy contest, Alleghany had acquired *de facto* control of New York Central Railroad Company, a carrier, and also of the Louisville & Jeffersonville Bridge Company, a second carrier in the Central system, as a result of a merger application under § 5(2) approved in 1955, and that therefor the ICC had jurisdiction over Alleghany pursuant to § 5(3) of the Act. This Court held that the ICC possessed *jurisdiction* even though it had never approved the acquisition of control of New York Central, because any other holding would reach the "quixotic" result that "the failure of a company engaging in a transaction requiring Commission approval to apply for that approval would deprive the Commission of jurisdiction" (353 U. S. 151, 162).

Whether the Commission properly exercised jurisdiction when it approved the preferred stock issue is obviously another matter. Section 20a of the Interstate Commerce

---

[7] The District Court said:

> "In the absence of compelling reasons to the contrary, as to which no findings were made, authorization of continued control should logically be determined before the stockholders act upon the proffered exchange and before the stock becomes available for sale to the public, not afterwards. To say the least, it would be arbitrary to authorize the issue without even considering the effect of divestiture upon the value of this important asset as long as that action remains a possibility. Reconsideration by the Commission for that purpose is therefore necessary." (ICC Jurisdictional Statement, at pages 38-39).

Act forbids the issuance of securities by those under Commission jurisdiction without its approval. It empowers the Commission to grant approval "*only if* • • • for some lawful object • • • compatible with the public interest • • • and • • • reasonably necessary and appropriate for such purpose" [49 U. S. C. 20a(2)].

The ICC has repeatedly held that when a proposed new security is to be based on assets acquired in violation of § 5(2), it cannot "justify the findings required by § 20a of the Act as to the objects and purposes involved in the issue" (See pp. 16-18, *infra*). Alleghany's proposed New Convertible Preferred Stock and its proposed New Common Stock to be issued on conversion of the Preferred were admittedly to be based on $14,700,000 (now $27,000,000) of illegally-acquired Central controlling stock. Thus to the extent that the two new stocks capitalize the illegal assets, their issuance is not "for some lawful object"; insofar as the two new stocks expose future public investors to the risks inherent in the illegal assets, their issuance is obviously not "compatible with the public interest"; and in view of the fact that the huge funds ($27,000,000) diverted to purchase the illegally acquired assets would more than pay off the $18,000,000 of dividend arrearages on the old stock whose accrual and alleged unpayability are the only grounds for the new stocks' issuance (R. 528-530), their issuance could not be "reasonably necessary and appropriate" in the circumstances.

All appellants concede, as the District Court found, that Alleghany's Central investment is "subject to injunction, divestiture and other sanctions" under § 5(4), (7), (8), and (9). But they condition the concession upon the correctness of the finding by Division 4 and the District Court of a § 5(2) violation. Accordingly, their entire case is based on a denial of that violation despite its incontestable nature. Realizing this, they seek to widen the scope of last Term's decision by asserting the District Court's disobedience to an implied mandate never given. The District Court found no substance to such a notion.

In addition the District Court expressly left the door open to a regularization by Alleghany of its position, if it would merely file an application under § 5(2) to control the New York Central system, and to obtain the statutory finding that Alleghany's control and the methods by which it obtained it were "in the public interest". In 1954, large institutional investors in Central securities, such as the Metropolitan Life Insurance Company, the John Hancock Insurance Company, as well as Harold S. Vanderbilt and other directors on the old Central board, had contended that such acquisition was not "in the public interest" but, like appellees they were subsequently denied any hearing on this issue by virtue of an ICC decision overruling Division 4's finding that § 5(2) had been violated.

It is obvious that different findings of fact and conclusions of law are required under § 5(3) than are required under § 20a. Yet by making it seem that the legal effect of the § 5(2) violation would be held by this Court to be the same with respect to both sections of the statute, appellants are hoping to shut off any consideration of the merits of the District Court decision. That the same factor should have two entirely different legal consequences is explained more fully under point I of this motion, sub section (C).

Other attempts to confuse this Court by contending that appellees did not properly raise before the ICC the issue upon which the District Court decided in favor of appellees, are made clear by reference to Appendix A to this motion, in which a chronology of the pleadings and of the ICC rulings is outlined. In Appendix B for the information of this Court appellees also deal with the events and legal issues arising after the close of the ICC record, that record providing the sole basis for review at the present time.

As we shall show, the findings of the District Court are unassailable and require affirmance of the judgment below.

ARGUMENT

I

The District Court correctly ruled that Congress under the standards of § 20a(2) prohibited the exposure of the public to the risks inherent in securities based on unlawfully acquired assets.

The decision of the District Court is based on two rulings: (A) that Division 4 correctly ruled that the acquisition of control of the 73 carriers in the New York Central System violated § 5(2);[8] and (B) that § 20a(2) prohibits the issuance of securities based on assets acquired in violation of § 5(2). We shall attempt to show that the District Court's decision is so clearly correct that no oral argument is required and that the judgment should be affirmed.

Exposition of these points will make it clear we believe, as set forth in (C) hereafter, that there is no basis for appellants' contention that the District Court was disobedient to the mandate of this Court.

A. CONGRESS SPECIFICALLY AMENDED THE INTERSTATE COMMERCE ACT TO PREVENT AN UNAUTHORIZED ACQUISITION OF CONTROL OF A SINGLE SYSTEM OF "TWO OR MORE CARRIERS."

There is overwhelming and uncontroverted support for the District Court's holding that the statute requires a control application whether or not the "two or more carriers" acquired are part of a single established system:

---

[8] This point was fully briefed and argued before the Court last term, but was expressly left undecided in its opinion as not necessary to decision (353 U. S. 151, 161-162). See Briefs in Nos. 36 and 114, October Term, 1956. Brief for Appellees, pp. 66-79; ICC brief, pp. 47-63; Alleghany Brief, pp. 77-84, and Reply Brief, pp. 9-18.

(1) The explicit language of the fourth clause of § 5(2)(a)(i) which specifies "two or more carriers", not "two or more systems";[9]

(2) Senate Report No. 180, 75th Cong. 1st Sess. (1937) and its explicit reference to this system argument "loophole" and to the 1933 Act's "ambiguity" in this respect;[10]

(3) The addition by Congress of the words "or otherwise" to the fourth clause in the 1940 amendment, and its simultaneous broadening of the scope of § 5(4);[11]

(4) The Report of the ICC Examiner in the 1945 Alleghany case holding as contended here with respect to an unauthorized acquisition of control of The Chesapeake System (consisting of The Chesapeake & Ohio; New York, Chicago & St. Louis; and Pere Marquette Railroads);[12]

(5) Alleghany's acquiescence in that report by its request for approval of acquisition of control of the Chesapeake System in the 1945 case;[13]

(6) The 1945 order specifically approving and authorizing Alleghany's acquisition of control of the above "carriers" in the Chesapeake System (R. 184);

---

[9] The relevant text of the statute is set forth in ICC Jurisdictional Statement, p. 79. See fourth clause, which makes it unlawful without ICC authorization "for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise;" and fifth clause which similarly prohibits a non-carrier "which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise."

[10] See Brief for Appellees, *Alleghany Corp.* v. *Breswick & Co.*, No. 36, October Term, 1956 at pp. 66-69.

[11] Op. cit., pp. 69-71.

[12] Op. cit., pp. 73-76.

[13] Op. cit., p. 75, fn. 19. Alleghany's Reply Brief objected to the characterization of its action in the 1945 case as "an application" for authority to acquire control. But the ICC, without objection, so treated it. Id., fn. 19.

(7) Division 4's finding in the 1955 jurisdictional case that in the *Chesapeake* case (261 ICC 239)

> "among other things, Alleghany was authorized, through ownership of stock, to acquire control of the Chesapeake & Ohio Railway Company, herein called Chesapeake; the New York, Chicago & St. Louis Railroad Company, and the Pere Marquette Railway Company, and their respective subsidiaries and affiliates, herein together referred to as the Chesapeake system" (R. 418).
>
> "Alleghany will continue to be considered as a carrier subject to the Act through the vehicle of the Central System in lieu of through the Chesapeake System" (R. 441);
>
> "However, unlike the request in the *Chesapeake* case, the authority now requested involves only our approval of the proposed change in the manner of control of the properties and franchises of Jeffersonville. • • • The application in the *Chesapeake* case differed • • • also in that Alleghany at that time requested our authorization to control Chesapeake and its related *carriers*" (R. 427);

(8) Central's and ICC's consistent administrative practice under § 20a(12) in seeking and granting approval to interlocking directors between the "carriers" in the Central System;[14]

(9) Division 4's own ruling and case citations in the 1955 jurisdictional case showing Alleghany's "inconsistency" and the unchallenged prior administrative interpretation (R. 425);

(10) The fact that Congress did not, according to this Court's decision last Term (353 U. S. 151), exempt a non-carrier person's acquisition of a second carrier in the same system from a control application under the fifth clause of § 5(2)(a)(i), the very next clause after the one now at issue.

---

[14] Op. cit., pp. 76-77.

(11) This Court's ruling last Term in the present case that intra-mural shifts in control, even though "small, even minimal" in effect must be authorized by ICC order (353 U. S. at 170).

None of these propositions is even adverted to or rebutted by appellants. The full I. C. C.'s disregard of them in its report on reconsideration, as in its statements here, is supported by reference to no authority, be it statutory, legislative, administrative or judicial.

The findings of Division 4 showing Alleghany's "inconsistency" and statutory violation.

These findings appear at R. 425-426:

> "The Central System includes many individual carriers which are controlled by Central through stock ownership or otherwise. We long have recognized under section 5, that railroad systems are comprised of 2 or more carriers, and that control of a single system may not lawfully be effectuated without our approval and authorization. (*Citing Seaboard Air Line Ry. Co. Receivership*, 261 I. C. C. 689, 717. *New York S. & W. R. Co. Reorganization*, 282 I. C. C. 801 (not printed in full). *Arkansas & L. M. Ry. Co. Control*, 282 I. C. C. 254, 260. *Weinstein-Control-Capital Transit Co., and Montgomery*, 56 M. C. C. 127, 131; *Stonghton-Control-Delaware Coach* Co., 57 M. C. C. 456. *Kittrell-Control-Dixie Motor Coach Corp.*, 37 M. C. C. 91.) That principle is considered basic, almost as a definition. So much so, that the question of acquisition of a carrier system has never been contested before the Commission, and as far as we know, there have been no court decisions touching on that issue. Nevertheless, because of the stress which Alleghany places on that point, some discussion thereof is necessary" (R. 425).
>
> "In what appears to be an inconsistency, Alleghany's counsel also argued that because Alleghany (a noncarrier railroad holding company), has control of a major railroad system, it should continue to be considered as a carrier subject to our jurisdiction.

That conclusion could be justified under the Act, only on the grounds that Alleghany controls more than one carrier subject to the Act.

"Among other arguments, Alleghany's suggestion that a decision contrary to its views would result in requiring approval by us whenever a board of directors of a carrier corporation is replaced by the stockholders' election, also is untenable. To reason thus ignores the distinction between election of individuals as directors and control of the board of directors. The latter situation seems to have arisen when Alleghany, through the ownership of stock and the naming of a board of directors of its own choosing or otherwise, assured itself of control of the board of directors of Central and its related carriers. As a consequence, a holding company and those in control thereof, admittedly acquired control of a carrier which controls subsidiary carriers. In our opinion the Congress sought to prohibit that type of acquisition of control, unless approved and authorized by us upon consideration of an application, and upon our finding that the proposal would be consistent with the public interest" (R. 426).

The Reasons given by the Full ICC for Overruling Division 4 Conflict with the subsequent Findings of this Court.

Upon reconsideration in the jurisdictional proceeding, the full ICC overrruled Division 4 by finding:

"Central was formed in 1914 by the consolidation of 11 carrier companies. It is the parent company of the New York Central Railroad System, comprised of numerous carriers including several railroad systems and the railroads and properties controlled and operated by those companies under lease or otherwise. The present system was recognized by us as an integrated unit in *New York Central Unification*, 150 I. C. C. 278, decided January 14, 1929, and upon the internal rearrangement of Central's corporate structure pursuant to our decision in Finance Docket No. 17700, *New York Central R. Co. Merger*, 282 I. C. C. 813 (not printed in full), decided June 18, 1952. As outlined in detail in the foregoing reports and in the

record herein, the same executives serve Central and the subsidiary companies and the carriers of the system have interlocking directorates.[15] When Allegheny, by stock ownership and by the favorable action of the stockholders acquired control of Central, all the properties within the carrier's orbit were under long established single operating control" (R. 511-512).

"As Central, at the time of such acquisition of control was recognized as a single established system, we conclude that the transaction was not within the scope of the above stated provisions of section 5(2) of the Act and that our approval was not necessary" (R. 513-514).

In overruling the above finding the District Court held:

"Its language [§ 5(2)(a)] does not suggest any exceptions and certainly none on the basis of common control by someone else having been previously authorized. It seems to us that as long as the carriers remain unmerged and unconsolidated, the Commission has full power and the duty to decide whether control of them all or any of them by the proposed new person is in the public interest. • • • We believe our view is strengthened by the emphasis in the Supreme Court's opinion upon the importance of keeping sight of the individual entities within the system (353 U. S. at p. 170).

"In earlier stages of the litigation defendants have expressed fear that injecting the Commission into proxy contests would unduly interfere with stockholder suffrage. As we pointed out in an earlier opinion, 134 F. Supp. 132, 144, although this concern might have relevance where control was acquired other than by the acquisition of a controlling block

[15] We interpolate here that the ICC omitted to note that these interlockings were pursuant to special applications and orders under § 20a(12), which speaks as does § 5(2) of "carriers", not systems. See Brief for Appellees, No. 36, Oct. Term, 1956, at pp. 76-77.

> of corporate stock by a single person, or a small concerted group of persons, there were no findings that such was the case here. On the contrary, a significant part of the Commission's regulation of Alleghany has concerned the acquisition of such a block of Central's stock and coordinated activities of Alleghany's officers as individual stockholders of Central. See *Chesapeake & O. Ry. Co.-Purchase*, 271 I. C. C. 513 (1948)". (ICC Jurisdictional Statement, pp. 34-35, and fn. 6a.)

Alleghany's argument that § 5(2) has been violated by numerous other controlling persons if it applies to acquisition of control of a system, is without any legal force. In none of its examples (Alleghany Jurisdictional Statement, pp. 17-18) did a holding company acquire control and interlock its officers and directors. As above shown, this was the specific type of acquisition at which the 1940 amendment to the Act was directed, after a Senate report identifying Alleghany as the beneficiary of the previous "loophole." And the ICC's subsequent administrative practice with respect to Alleghany in the 1945 proceedings confirmed that this type of control was the objective of the amendment. Nor even if the examples were apposite, would the fact that others have violated the Act excuse Alleghany's violation.[16]

This Court, in its decision last Term, specifically rejected appellees' argument and the District Court's finding that where "the merger still leaves the non-carrier in indirect control of such property, no acquisition (of control) by the non-carrier results from the merger • • •". 138 F. Supp. at 127-128, as cited at 353 U. S. 165-166. Mr. Justice Frankfurter, for the majority, explicitly held:

> "We think that this is too narrow a reading of the statute. Not labels but the nature of the changed

---

[16] An answer to the fears of the ICC and Alleghany over the fate of future proxy contestants is set forth in Brief for Appellees, No. 36, October Term, 1956, at pp. 78-79.

relation is crucial in determining whether a rearrangement within a railroad system constitutes an 'acquisition of control' under § 5(2)" (353 U. S. at 166).

"The crux of each inquiry to determine whether there has been an 'acquisition of control' is the nature of the change in relations between the companies whose proposed transaction is before the Commission for approval. Does the transaction accomplish a significant increase in the power of one over the other, for example, an increased voice in management or operation, or the ability to accomplish financial transactions or operational changes with greater legal ease?" (353 U. S. at 169).

Alleghany now has a direct 17% stock investment in Central and interlocking directors owning additional Central stock, which this Court held constituted a *de facto* 'acquisition of control' (353 U. S. at 165). None of these relationships existed in 1929 or 1952 when, in the ICC's words, "The present system was recognized by us as an integrated unit." Alleghany, of course, was not even a party to those earlier control cases. Yet it is obvious that its $14,700,000 stock investment (now $27,000,000) indicates a "changed relation" and "a significant increase in power" over Central much greater than the "small, even minimal" effect of the Jeffersonville Bridge Company merger with the Big Four, a merger with a company *already* owning and controlling 100% of the Bridge Company. If that "minimal" change in relationship, to quote this Court, represented an "acquisition of control" by Alleghany of the Bridge Company that required statutory authorization under § 5(2), by what logic may it be argued that a massive new investment of $14,700,000 by the same new controlling person represents no "changed relation" and no "significant increase in power?" The ICC's only answer is that when it authorized somebody else other than Alleghany, namely the New York Central Railroad Company (a separate carrier), to acquire control of the other 72 carrier companies it thereby perpetually immunized all other acquisi-

tions of control by other persons of the same 73 companies from the requirements of the Act.

The District Court, faced with this very "inconsistency" that Division 4 had earlier recognized stated that the "language [of § 5(2)] does not suggest any exceptions and certainly none on the basis of common control by someone else having been previously authorized". (ICC Jurisdictional Statement, p. 34)

B. THE DISTRICT COURT CORRECTLY RULED THAT THE STANDARDS OF § 20a PROHIBIT THE ISSUANCE OF SECURITIES BASED ON UNLAWFULLY-ACQUIRED ASSETS.

In this section we will show (1) that long-established, consistent and continuous administrative precedents of the ICC bar § 20a issuance of securities based on assets acquired in violation of § 5(2); (2) that the ICC has similarly barred relief to violators of § 5(2) under sections other than § 20a; and (3) that the District Court was correct in following these precedents.

It has been the consistent administrative practice of the ICC to deny a carrier the right under § 20a to issue new securities based on any asset unlawfully acquired.

In *Bonds of St. Louis-San Francisco Railway Co.*, 150 ICC 139 (1928), the carrier applied for authority under § 20a to issue $8,000,000 of consolidated mortgage gold bonds. The ICC denied the application as to $5,000,000 of the proposed issue that would have been based on stocks acquired without its approval, stating:

> "The applicant has acquired the 183,333 shares of Rock Island common stock without our authority, presumably as a step toward acquiring control of that company. If carriers use their resources and credit to acquire the stocks of other carriers without first obtaining such authority, they do so with the knowledge that it may not be granted, and that until

it is granted and the conditions above indicated fulfilled, that their investment in those securities cannot be used as a basis for capitalization." (pp. 140-141)

In *Bonds of Chesapeake & Ohio Ry. Co.*, 150 ICC 257 (1929), the carrier applied under § 20a for authority to issue bonds to reimburse its treasury for, among other expenditures, the purchase of all the capital stock of three smaller carriers. It was held that since there was no authority to secure control that the acquisition could not be the basis of the issuance of the bonds. The ICC stated:

"In *Securities of Louisville & Nashville R. R.*, 76 ICC 718, 723, we said:

'We are of the opinion that ordinarily a carrier may properly capitalize investments in the stock of another corporation where, and only where, the latter is the owner of operated railway property and the carriers' holdings are sufficient and essential to give it control of that corporation and it appears that such control will probably be permanent. * * *'

* * *

"Although the entire capital stock of the three companies named in the preceding paragraph was purchased and is now held by the C & O, the stock was acquired without our approval or authorization and without our having the opportunity to determine whether it was acquired for such consideration and upon such terms and conditions as were just and reasonable. Likewise, no opportunity was afforded us, as in the case cited above, to prescribe any conditions limiting the disposition of the stock in connection with its acquisition." (150 ICC at pp. 258, 259)

"The stock of the Ashland, the Long Fork, and the Millers Creek not having been acquired in accordance with the provisions of paragraph (2) of Section 5 of the Interstate Commerce Act, the peculiar status of the C & O in relation to these companies and the stock and properties thereof is not such, in our opinion, as to justify the finding required by Section 20a of the Act as to the objects and purposes involved in

the issue of bonds of reimbursement of expenditures amounting to $6,246,646.67 made in respect to those companies and their properties for the purposes stated above." (150 ICC 257, 260)

The ICC has also continuously and consistently barred administrative relief under other sections than 20a to § 5(2) violators.

Despite the attempt of appellants to impute novelty to the District Court's action, the decision is fully documented with unchallenged citations from ICC administrative practice to the effect that unless exceptional circumstances are shown, §5(2) violators will be barred from administrative relief under or the benefit of the various sections of the statute. The following summary by the District Court of ICC policy is unchallenged by the ICC or any appellant herein:

> "The Interstate Commerce Act was never intended as a source of relief for a person in illegal control of a carrier. Such a person might be subject to all the burdens and duties imposed by the Act upon a person in legal control, but relief or benefit for such a person may not be rationally authorized under the Act, except upon finding that the public interest required such authorization notwithstanding that person's violation of the Act. In the absence of any finding that immediate action is needed in the public interest, as distinguished from the private interest of Alleghany, the stock authorization should await an appropriate application for approval of its control.
>
> Further, reconsideration by the Commission is required because, once the error of law is recognized, the Commission's action would be in arbitrary conflict with its own settled policy, to compel prompt application for approval of acquisition of control where required under the Statute, a conflict with which the Commission was not faced so long as it believed approval of acquisition of an integrated system unnecessary. It has consistently denied relief sought by those in illegal control and usually

compelled divestiture except where it has found continuation of the control clearly in the public interest and, in most cases, that the failure to request approval was in good faith due to an oversight." (ICC Jurisdictional Statement, pp. 42-44).

No less than 28 ICC cases are cited in the court's opinion. (See footnotes 12 and 13). Appellants cite no contra authority, and indeed do not dispute the point.

The District Court made correct findings as to the impropriety of issuance of the new stocks in violation of § 20a(2) standards.

Last Term this Court affirmed (353 U. S. at 165) the ICC's finding that Alleghany had acquired *de facto* control of the New York Central Railroad System of 73 carriers (290 ICC 725; 295 ICC 11).[17] As of December 31, 1954 (the latest record date) that *de facto* control was evidenced by an investment of $14,700,000 at current market quotations in 577,200 shares of the capital stock of Central, representing "over ¼ of its (Alleghany's) total portfolio". (I. C. C. Jurisdictional Statement, pp. 37-38). Alleghany's annual report for 1956 shows that it has increased this investment to 973,500 shares of Central stock at a cost of $27,000,000 or roundly, $28 a share. (See N. Y. Times, Nov. 16, 1957, pp. 26, 32). Last month (November 1957) the stock broke to a new low price of $15⅛, representing a book loss to Alleghany of roundly $12,000,000 on its present Central shareholdings and is currently (December 6, 1957) selling at $15¼.[18] Under Alleghany's application, as approved by the ICC, the issuance of some 6,200,000 shares of New Alleghany Common Stock and 1,364,000 shares of New Preferred Stock is authorized. The New Common Stock would be issued upon conversion of the New Preferred Stock, and the New Preferred is to be issued pursuant to an

---

[17] A list of the 73 carriers is appended to 290 I. C. C. 725, at 748-749.

[18] N. Y. Times, December 7, 1957, p. 34.

Exchange Offer, dated February 10, 1955 (R. 331-365) for the Old (Non-Convertible) Preferred. Thus, a substantial part of the two new stocks' equity would be based on the Central investment and would represent a capitalization of the illegally acquired Central investment. Obviously, the conversion rights to the New Common Stock that are given the New Preferred and the New Common Stock shares received upon conversion would rise and fall in substantial part depending on the rise and fall of the Central stock. It would be impossible for the wisest public investors accurately to appraise the new stocks while the illegality existed and the administrative remedy therefor was undecided. As Division 4 found:

> "The conversion rights of the 6% Preferred Stock will afford the holders thereof an opportunity to participate in the progress of applicant, as reflected in the market value of its common stock" (R. 530).

Thus an investor buying the New Stock because he desires to participate in the long-term capital gain potential of the common stock, based on the massive Central investment, would be deprived of that element of value if divestiture is ordered.

Conversely, an investor might be prompted to sell the New Stock in the belief that the New York Central investment was permanent and that its capital loss potential did not justify an optimistic appraisal of the conversion rights. Or if an investor knew the asset to be illegal, he might retain it in the expectation it would ultimately be divested and replaced with sounder investments that would make the capital-gain potential of the conversion rights more attractive. Unwary investors, in short, innocent of the illegal acquisition, would buy or sell the stocks and thus unwittingly act upon an investment based on illegal assets issued with the official authorization of an agency of the Government of the United States. Plainly, Congress never intended that § 20a should be used for such an improper purpose.

Under § 20a(2) of the Interstate Commerce Act the ICC may authorize issuance of new securities

> "only if * * * for some lawful object * * * compatible with the public interest * * * and * * * reasonably necessary and appropriate for such purpose" (49 U. S. C. 20a(2)).[19]

To the extent that the two new stocks capitalize the illegal assets, their issuance is not "for some lawful object"; insofar as the two new stocks expose future public investors to the risks inherent in the illegal assets, their issuance is obviously not "compatible with the public interest"; and in view of the fact that the huge funds ($27,000,000) diverted to purchase the illegally acquired assets would more than pay off the $18,000,000 of dividend arrearages on the old stock whose accrual and alleged unpayability are the only grounds for the new stocks' issuance (R. 528-530), their issuance could not be "reasonably necessary and appropriate" in the circumstances.

The District Court made findings in this respect that are left unchallenged in appellants' jurisdictional statements:

> "As long as Alleghany's control of Central is unapproved, it is subject to injunction, divestiture and other sanctions. The effect of this cloud upon the value of the stock is a matter for expert consideration rather than our speculation. In the absence of compelling reasons to the contrary, as to which no findings were made, authorization of continued control should logically be determined before the stock-

---

[19] The last sentence of § 20a(2) reads in full:

"The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

holders act upon the preferred exchange and before the stock becomes available for sale to the public, not afterwards. To say the least, it would be arbitrary to authorize the issue without even considering the effect of divestiture upon the value of this important asset as long as that action remains a possibility. Reconsideration by the Commission for that purpose is therefore necessary. The Commission's duty under section 20(a) is for the protection of investors as well as persons dependent upon transportation" (I. C. C. Jurisdictional Statement, pp. 38-39).[20]

In this connection the District Court called attention to the legislative history of § 20(a):

> "While the dominant purpose of § 20(a) was to ensure sound railroad financing in the interest of the proper development of our transportation system, an important related aim was 'to protect the investing public against the dissipation of railroad resources through faulty or dishonest financing' (Sharfman, the Interstate Commerce Commission, Vol. 1, pp. 189, 190).[21]
>
> "Throughout the history of this legislation, there was universal recognition of the interrelation of sound railroad financing and the protection of investors, the latter being essential to maintaining con-

---

[20] Despite these findings of the District Court, followed by findings extending over three printed pages reciting § 20(a)'s legislative history (ICC Jurisdictional Statement, pp. 39-41; fn. 11), and the court's specific citation in support of its ruling of *Bonds of Chesapeake & O. Ry. Co., supra*, (Id., p. 44), which as above noted held that a violation of § 5(2) made it impossible "to justify the findings required by § 20a" (150 ICC at 260), the ICC blandly states: "In its opinion, the District Court found that the Commission's order *satisfied* the provisions of Section 20a." (ICC Jurisdictional Statement, p. 8, emphasis supplied). The ICC builds almost its entire statement on this palpably untrue foundation.

[21] Appellees interpolate in this connection that, as previously noted, Alleghany has already suffered a book loss of $12,000,000 on its Central investment. Appellants in effect propose that this loss be absorbed by Alleghany's innocent stockholders rather than the persons who caused it to make this illegal investment.

fidence in railroad investment. 58 Cong. Rec. 9160, 9163 (66th Cong. 1st Sess.); Sharfman, The Interstate Commerce Commission, pp. 190-191 (1931)." (ICC Jurisdictional Statement, p. 39, fn. 11)

In construing § 20a this Court has stressed the Congressional concern for "the soundness" and "quality" of the "aggregate capitalization."

In *Ecker v. Western Pacific R. Corp.*, 318 U. S. 448, at 474, this Court stated that the ICC under § 20a must pass upon "the soundness of the aggregate capitalization" and "the quality of the securities to be issued". How "sound" and of what "quality" are securities based on illegal assets?

The *Rutland Railroad* case stresses that "20a is directed primarily to safeguarding the 'public interest' " (143 F. 2d at 185), and includes "the safeguarding of future investors in the new securities" (fn. 17). In *Seaboard Air Line Ry. Co. Receivership*, 261 ICC 689 at 723, the ICC delineated § 20a as including the duty to determine that "the terms of the securities are in conformity with modern and sound financial practices." There is nothing new in these standards. As early as *Consolidation and Combinations of Carriers*, 12 ICC 277, 306, the ICC stressed that "It is of the utmost importance, also, that railway securities should be safe and conservative investments for the public."

§ 20a must, of course, be construed against the declaration by Congress of National Transportation Policy in the preamble to the Interstate Commerce Act. That declaration requires that the Act be "so administered as to • • • foster sound economic conditions." The preamble to § 20b, the voluntary recapitalization section, further elucidates the policy by requiring that it be administered so as "to promote the public interest in increased *stability* of values of railroad securities with resulting greater confidence therein of investors."

Clearly under the above standards and precedents, the District Court had no choice other than to set aside the § 20a order.

C. THERE IS NO SUBSTANCE TO APPELLANTS' CONTENTION THAT THIS COURT EXCLUDED FROM THE DISTRICT COURT'S DUTIES UNDER THE REMAND THE DETERMINATION OF THE § 5(2) QUESTION INSOFAR AS IT WAS RELEVANT TO THE ISSUES UNDER § 20a.

This Court in 353 U. S. 151 affirmed the ICC's order dated May 24, 1955 assuming jurisdiction over Alleghany Corporation pursuant to an application under § 5(3), in Finance Docket No. 18656, and then remanded the case to the District Court in the following words:

> "For all these reasons, the judgment of the District Court must be reversed and the case remanded for consideration by the District Court of appellees' claim, *not previously discussed*, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act" (353 U. S. at 175, emphasis supplied).

Thus, the District Court was required to find whether the ICC's order of June 22, 1955, in another docket (No. 18866) approving an application under § 20a(2) and authorizing Alleghany to issue the new 6% Convertible Preferred Stock and the New Common Stock met the requirements of the following statutory standards:

> "Sec. 20a(2)
>
> "* * * The Commission shall make such order *only if* it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose" (49 U. S. C. § 20a(2)).

The District Court held, as set forth above, that the ICC could not find as a matter of law that the two new security

issues met these § 20a standards, since they would be issued against $14,700,000 of illegally-held assets.[22] No § 20a(2) claim was "previously discussed" in this Court's opinion, the 20a issue was not even briefed by any party on the first appeal. Neither in fact nor in law was it then decided; and it is obvious that determination of the issue requires different findings of fact and law than did the decision of the § 5(3) question. Affirmance of the § 5(3) jurisdictional order merely required, as this Court held, that Alleghany was in de facto control of one carrier (Central) and had acquired control of a second carrier (the Bridge Company).

Appellants contend, however, that when this Court affirmed the ICC's status or jurisdiction-assuming order of May 24, 1955 under § 5(3), based on an application to merge the Jeffersonville Bridge Co. into the Big Four Railroad, it implicitly (not explicitly) resolved against appellees their present claim in opposition to an entirely different application resulting in an entirely different ICC order under an entirely different section as now decided by the District Court. Appellants deduce this from the fact that in affirming the status order of May 24, 1955 under § 5(3), this Court held that there was no "need" to determine whether there was a violation of § 5(2) by Alleghany and "we • • • intimate no opinion on it, *since a violation should not deprive the Commission of jurisdiction over the violator.*" (emphasis supplied).

Insofar as the § 20a(2) ruling is based upon the § 5(2)(a)(i) violation, there is clearly no violation of this

---

[22] The District Court gave other grounds for its decision, which it is unnecessary to discuss if, as we have endeavored to show, the grounds briefed here are sufficient to sustain the result. With respect, however, to these other grounds, it should be noted that the court fully cited ICC administrative precedents showing the impropriety of according a § 5(2) violator any relief or benefit under the Act. (See cases in footnotes, 12 and 13 of its opinion, ICC Jurisdictional Statement, pp. 42-45). In the § 5(3) case Alleghany was permitted to acquire the Bridge Company solely for the purpose of imposing ICC jurisdiction. None of the cases cited by the District Court are § 5(3) cases. Appellants' failure to comment on these cases is noteworthy.

Court's mandate. By their application for summary reversal appellants are seeking to deprive appellees of their day in this Court and in the lower Court on this claim by their contention that the District Court disobeyed this Court's mandate. In holding there was no "need" to adjudicate violation in affirming ICC "jurisdiction" this Court said: "To punish a violator by depriving the Commission of *jurisdiction* over it would be indeed quixotic". (353 U. S. at 162). The present appeals, like the decision below, concede the jurisdiction of the ICC to determine the § 20a issue.[23] (ICC Jurisdictional Statement, pp. 46-47). This Court did not hold, as appellants argue, that there was no "need" to adjudicate a § 5(2) violation in the § 20a stock issue proceeding, or that that question not being relevant in the § 5(3) jurisdictional proceeding was also irrelevant in the § 20a proceeding. Clearly, we think, this Court would not hold that two different statutes requiring the application of different standards and the making of different findings of fact and law, would be governed by an opinion leaving undecided, because unnecessary to decision in the first case, a decision statutorily made necessary in the second.

To extend, as appellants would, this Court's opinion upholding the ICC's jurisdiction under § 5(3) over Alleghany into a resolution of the § 20a(2) public interest and other standards is to resolve a question left specifically unresolved by this Court. Thus, in its majority opinion, the Court stated (353 U. S. at 161-162):

> "The District Court held that whatever control Alleghany had over Central did not fit within the statutory requirement of 'a person which is not a carrier and which has control of one or more car-

[23] The ICC makes it seem that the issue is one of "the Commission's power or jurisdiction to consider and act upon Alleghany's application under § 20a". (ICC Jurisdictional Statement, p. 12). This is not correct; the issue is the failure of Alleghany to comply in fact and law with the standards of § 20a.

riers' because the Commission had not given the approval necessary for acquisition of control of Central and its subsidiaries, 'two or more carriers.'

"The Commission and Alleghany contend that Commission approval of the acquisition of a single, integrated system is not necessary. We need not decide this question, however, and intimate no opinion on it, for even if such approval is necessary, the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' refers to 'control' and not to 'approved control'. There seems to be no reason to read in the word 'approved'. Such a holding would mean that the failure of a company engaging in a transaction requiring Commission approval to apply for that approval would deprive the Commission of jurisdiction. Remedies against a violator are provided by § 5(7), (8), and (9) of the Act. To punish a violator by depriving the Commission of jurisdiction over it would be indeed quixotic. As the Commission points out, the problem would appear clearer were Alleghany contesting, rather than acquiescing in, its jurisdiction."

Here, instead of the Commission being "deprived" of jurisdiction, its jurisdiction is recognized and the reason to "read" in the word "approved" comes not only from long-established ICC precedents under § 20a(2), but the legislative history and statutory intention of Congress as cited by the District Court (See pp. 16-23, *supra*).[24] Those citations, it should be noted, are neither commented upon nor opposed by any authorities in appellants' jurisdictional statements.

---

[24] Appellants seek to exclude from the ICC's available remedies the power to deny issuance of securities against illegally held assets. Were this Court to grant summary reversal its action could be construed as limiting the ICC's remedies despite this Court's specific holding that "Remedies against a violator are provided by § 5(7), (8), and (9) of the Act." (353 U. S. at 162)

II

If the Court accepts the present § 5(2) argument of appellants, fairness would require that last term's majority opinion of the Court be vacated, and the minority opinion adopted as the opinion of the Court.

Alleghany's Jurisdictional Statement (pp. 17-18) and the ICC's (p. 15) reassert the position on § 5(2) that they briefed last Term. They ignore that this Court's majority decision of last Term required a control application by Alleghany where two or more "carriers" in the Central system were involved. The Court held that New York Central Railroad Company was "one or more carriers" and the Bridge Company "another carrier", to quote the fifth clause of § 5(2)(a)(i), and that Alleghany was therefore required to make, as it did, a control application (353 U. S. at pp. 165-171). Appellants are herein contending that in the same sentence the same word "carrier" previously so construed at their urging to exclude the "system" argument from being applied to the fifth clause, should now be construed so as to mean "system", not "carrier", in the fourth clause. (See footnote 9, this brief, for the relevant statutory language.)

This Court's majority opinion rejected appellees' argument, sustained last Term by the Chief Justice and Justices Douglas and Black, that the fifth clause of § 5(2)(a)(i) was not applicable to Alleghany because all the carriers were within one established system. The dissenting opinion stated:

> "To 'acquire control' (of a carrier) within the meaning of § 5(2) means then to put under common control carriers that previously were separate. We would strain to find a construction which would enable holding companies to run for shelter under the Act

> merely because, within the system they control, there have been corporate rearrangements or readjustments that change the internal structure of the system." (353 U. S. at p. 178)

The majority opinion having rejected this argument and appellants having accepted the benefits of the majority ruling, appellants are now estopped to contend that the same word "carrier" means "system" in the fourth clause, and does not mean "system" in the fifth. If appellants are now correct they have undermined the basis upon which last Term's decision was made in their favor; if they accepted that decision as correct, they must now accept the consequences of it. They can not have it both ways.

III*

Even assuming all of Alleghany's assets are lawfully held, there was a $20,600,000 *shortage* in assets for coverage of the quoted market values of Alleghany's securities at the time of the ICC's order.*

The record before the I. C. C. and in the District Court showed that, even if Alleghany's investment of $14,700,000 in 577,200 shares of New York Central stock as of December 31, 1954, is included as lawfully held, and all its other assets are included there still remained a *shortage* of $20,600,000 in capital assets to support the market prices of Alleghany's equity securities (its Prior Preferred, Preferred and Common stocks, and outstanding option warrants) on June 22, 1955, the date of the I. C. C.'s final

---

* If this point of appellees is correct, it would be sufficient to sustain the result below, thus dispensing with the need for a determination of the previous questions.

order herein.[25] On May 22, 1955, the day preceding the order of Division 4 herein, the shortage amounted to roundly $17,400,000. While the District Court did not discuss this question, appellees brief it here solely to show the propriety of the result and as an independent ground for affirmance assuming appellants are correct in their assertion that the New York Central investment is lawful.

The undisclosed risks to public investors created by Alleghany's financing.

On May 25, 1955, the date preceding the order of Division 4 herein, the net assets of Alleghany applicable to its equity securities (its prior preferred, preferred and common stocks, and outstanding option warrants) totalled roundly $75,000,000.[26] On June 22, 1955, the date of the ICC's final order, the total was roundly $85,000,000.[27] By comparison the market prices on these equity securities totalled an aggregate of roundly $92,400,000 on May 25, 1955, and roundly $105,600,000 on June 22, 1955, indicating that at the time of the ICC preliminary and final orders herein there were shortages of assets to support some $17,400,000 to $20,600,000 in publicly quoted market values for Alleghany's securities.[28] It was apparent, therefore,

---

[25] Unprinted record, affidavit of Randolph Phillips, affirmed June 14, 1957, par. no. 21. The record before the ICC did not disclose the asset shortage existing at the time of its orders. The balance sheets of May 25, 1955 and June 22, 1955, which disclosed the shortages, were not made available to appellees until the SEC hearings, almost a year after the close of the ICC proceedings. Had the requested evidentiary hearing been granted by the ICC such facts as herein appear could have been called to its attention. Where parties before an administrative agency have no opportunity to raise the issue before it, review of the issue is not barred by the courts. (See Appendix A to this brief, at p. A-3). Appellees' calculations were uncontroverted in the District Court.

[26] Id., par. no. 21.

[27] Id., par. no. 21.

[28] Id., par. no. 21.

from the financial structure being created by these orders that a speculative frenzy was being promoted with potentially deceptive securities. The holders of these securities, being uninformed of the actual net asset values then existing, were unaware of the risks involved. Since these securities were not closely held but far-flung throughout the securities markets, a question of public interest, necessity and propriety was thereby raised. It was incumbent upon the ICC first to ascertain the above pertinent facts and then to cast its order in a manner consistent with the public interest questions involved in accordance with § 20a standards.

In *Commercial Motor Freight, Inc.*, Finance Docket No. 18117, the ICC noted that "as of the date of the balance sheet, the applicant's capitalizable assets, determined according to the principles set forth in *Chesapeake & Ohio Railway Co. Stock*, 254 ICC 653, 669, and the cases it cited therein, exceed its capitalization by an amount sufficient to support the proposed issue of stock" (10 Fed. Carrier Cases, 430, 432). By contrast here, it is obvious that Alleghany's capitalizable assets applicable to its outstanding equity securities judged by the most significant test, that of market value at the time of the orders herein, were vastly insufficient.[29] In *M. H. Clarke, etc., Keeshin Freight Lines,*

[29] In a company whose major assets are investments with quoted market values (R. 166), it is obvious that the market value test is more significant than any other. Were the investments physical properties other tests would be more significant, such as book value or reproduction costs or going-concern value. As of December 31, 1954, the date of the latest balance sheet prior to the order of Division 4, Alleghany's total assets were $88,950,000 based on current market quotations (R. 162), of which $67,944,000 were total investments at current market quotations, including $19,657,800 represented by the New York Central Investment (R. 166, 169, fn. 3) (ICC Jurisdictional Statement, p. 38, fn. 8). While Division 4 referred to the market value of the assets as of November 30, 1954, as well as to their cost (R. 530-532), it failed to consider the adequacy of these assets to support the prevailing market prices.

et al., 10 Fed. Carrier Cases, 363, the ICC approved an overcapitalization because the stock was closely held and the holders were aware of the risks involved. By contrast here, there were some 1,186 holders of the old preferred stock as of February 10, 1955, the date of the Exchange Offer (R. 356), not to mention the 16,499 common stockholders of Alleghany as of August 24, 1954 (R. 220). In addition the stocks of Alleghany are listed on the New York Stock Exchange and widely traded in by the public, instead of being closely held, and there is no way to insure that any of the present holders, not to mention the new ones daily entering the securities market, are or will be aware of the risks involved.

Neither Alleghany, the ICC, nor any other appellant denied the facts of the capital asset shortage before the District Court. Alleghany, however, asserted that the ICC "computes capitalization on the basis of the par value of a corporation's outstanding securities, not market prices" (Alleghany District Court br., A 31). Such a test is obviously inappropriate where the par value has been written down, as in Alleghany's case, to nominal amounts for the common stock because of tax considerations, and where huge amounts of option warrants are outstanding which have no par value. Alleghany relied on *Chesapeake & Ohio R. Co. Stock*, 254 ICC 653, which disclosed that "applicant's common stock was selling at $47⅝, *approximately the same as the book value* • • • or nearly double the par value" (pp. 657-658). Thus it is clear under the very authority cited by Alleghany that the ICC uses book value in relation to market price to test the adequacy or soundness of the existing and proposed capital structure.[30] The rule is too obvious to be debatable; either there were adequate assets, based on book or market value, to support the struc-

[30] Book value was an appropriate test in the *Chesapeake & Ohio* case because the assets were mainly physical properties. See fn. 29.

ture or there were not. If there are not, the unsoundness of the structure is obvious, and it is plainly contrary to the public interest to facilitate the unloading upon the public markets of equity securities when there exists a shortage of assets to support the market prices at which the outstanding equity securities are selling. Here the extreme danger to which the ICC would expose the public is indicated by the huge amount of the capital insufficiency, namely some $17,400,000 to $20,600,000, at the time of its order, and the subsequent market collapse in Alleghany and New York Central securities. It is apparent that this collapse would have been less extreme had the ICC withheld authorization of the new and obviously inflated capital structure.

The ICC's duties under § 20a require it to find that "the terms of the securities are in conformity with *modern* and *sound* financial practices." *Seaboard Air Lines Ry. Co. Receivership*, 261 ICC 689, 723. Or, as the courts have stated, "20a is directed primarily to safeguarding the 'public interest' " and to "the safeguarding of future investors in the new securities" (*Rutland* case, 143 F. 2d 179, 185, 186 fn. 17).

The Collapse of Alleghany Security Prices Since the ICC Order Confirms the Impropriety of its Section 20a Findings and the Accuracy of the SEC's Warning that Issuance of the New Stock was not "Appropriate in the Public Interest."[31]

When the ICC issued its order herein on June 23, 1955, Alleghany common was selling at 10¾ compared to 4⅝ as of December 9, 1957 and the New Preferred stock on a when-issued basis sold at $34⅜ compared to recent bids of approximately $260. The lower quotes reflect declines of some $26,000,000 on the 4,600,000 shares of common outstanding and of some $11,000,000 on the 1,360,000 shares

[31] The SEC's findings are only of comparative interest, since this Court has in effect found it not to have had jurisdiction at the time it made them.

of New Preferred. Underlying these losses is the fact that Alleghany's holdings of roundly 1,000,000 shares of New York Central collapsed from a price of $44 per share on June 23, 1955 to $15⅛ as of December 9, 1957, representing a decline for the investment of some $29,000,000.[32]

These losses demonstrate pragmatically that the ICC in authorizing the issuance of the two new stocks has approved securities that are neither "appropriate", "sound", nor have "stability" within the meaning of § 26a and the declared policy of the Act. *In the Matter of Alleghany Corporation*, Investment Co. Act Release No. 2446, dated November 30, 1956, the SEC noted that the New Preferred stock's right to purchase was "potentially deceptive"; that such securities are "a speculative medium that introduce complicating and undesirable features into a corporate structure * * * confuse investors" and are not "necessary or appropriate in the public interest or consistent with the protection of investors."[33] These expert warnings have now been confirmed by the 66⅔% collapse of Alleghany's securities in the recent market decline, a decline far greater in degree than that for the market as a whole. The present appeals represent a continuation of attempts by the Preferred Stock appellants to consummate the unloading of their stock on innocent public "when-issued" buyers at the 1955 high prices despite the recent collapse in values. The public reports of the SEC disclose that on June 26, 1955, Robert R. Young, Chairman of Alleghany, started to unload his holdings by selling 1,500 shares of the New Preferred stock.[34] This occurred after he had doubled

---

[32] For 1955 prices, see Brief for Appellees, No. 36, October Term, 1956, at p. 109; the current quotations in The New York Times for December 10, 1957, except that the "when-issued" quotations on the New Preferred are taken from quotations published by the National Quotation Bureau.

[33] Its now prophetic decision is set forth in full in the amicus brief for SEC, No. 36, October Term, 1956, as an appendix thereto.

[34] See Official Sale of Security Transactions and Holdings, Vol. 21, No. 7, July, 1955, p. 1, and Form 4 Report to the SEC for the month ending June 30, 1955 by Robert R. Young.

his Old Preferred holdings and at the low prices prevailing in 1954 prior to announcement of the Plan. *Breswick* v. *Briggs*, 135 F. Supp. 397, 402-403.[35] His divestment program was halted only by the District Court injunction.

Similarly the Preferred Stockholder appellants Gruss & Co. are "when-issued" sellers (R. 75, 77) acting on behalf of themselves and other "when-issued" sellers of some 100,000 New Preferred shares at the 1953 prices (R. 77). If the final judgment below is reversed these sales contracts will be completed and the buyers forced to take securities that have since collapsed in price.

In its Jurisdictional Statement the ICC makes an indirect admission of the inequitableness of the appeals herein in speaking of the need for prompt consummation of the issuance and sale of the New Preferred stock "by permitting it to be carried out before it is made impractical by changing market conditions * * * before it is rendered irrelevant by changing business and market conditions." (pp. 21-22). That those changes have actually occurred since it issued its 1955 order may not be denied. Yet it still presses to consummate a plan that plainly has been "made impractical" and "rendered irrelevant" within the meaning of the "public interest" and the "reasonably necessary and appropriate" standards of § 20a.

CONCLUSION

The motion to affirm should be granted.

Respectfully submitted,

GEORGE BRUSSEL, JR.
Attorney for Appellants BRESWICK & CO. and MYRON NEISLOSS

RANDOLPH PHILLIPS, Appellant *Pro Se.*

December 10, 1957.

---

[35] For details, see Brief for Appellees No. 36, October Term, 1956, pp. 106-107.

APPENDIX A

Chronology of ICC Proceedings

On September 20, 1954, Alleghany and New York Central filed an application with the ICC under Section 5(2)(a)(i) of the Interstate Commerce Act for the alleged purpose of seeking ICC approval of a merger between a Central subsidiary (the Cleveland, Cincinnati, Chicago and St. Paul Railway Co., colloquially known as the "Big Four") and the Big Four's wholly-owned and wholly-controlled subsidiary, the Louisville & Jeffersonville Bridge Company (R. 210).

On January 11, 1955 Lewis D. Gilbert filed in the § 5(3) jurisdictional proceeding a petition to deny Alleghany's application for violation of § 5(2). (R. 269, 277-279). Alleghany's application under § 20a was filed on February 18, 1955 (R. 371). On February 4, 1955, appellee Breswick & Co. joined in the Gilbert motion (R. 317, 318). On March 2, 1955, Division 4 ruled in the § 5(3) proceeding that Alleghany had acquired control of the New York Central System in violation of § 5(2) but it nevertheless issued the § 5(3) order (R. 425-426). The Division also denied appellee Breswick & Co.'s petition to intervene (R. 416). On March 21, 1955, appellee and others filed an application for rehearing, urging the full ICC to reverse "on the basis of absence of statutory power and violation of the Investment Company and Interstate Commerce Act" (R. 448-449), the latter being an obvious reference to the § 5(2) violation found by Division 4. On April 11, 1955, in a joint amended petition in both the 5(3) and 20a proceedings; appellees Breswick and Phillips renewed their previous objections (R. 489, 491-492).

It was not until May 24, 1955 that the full ICC overruled the § 5(2) finding of Division 4 in the § 5(3) proceeding. Until then Division 4 had held up its § 20a report and order. It did not issue either until May 26, 1955 (R. 518, 536) when

it had become bound (as were appellees at the ICC level) by the prior overruling of the full Commission, and thus gave no consideration to the effect of the § 5(2) violation on the § 20a application.[1]

Appellees' first pleading in the § 20a docket was made on March 28, 1955 (R. 478), while Division 4's ruling of March 2, 1955 was still the law of the case, and at that time appellees were entitled to rely on that fact. In that pleading they expressly alleged in *haec verba* a violation of the § 20a "lawful object", "public interest" and "necessary" standards (R. 478-479). Since the ICC overruled Division 4 by its report and order of May 24, 1955, the point was disposed of at the ICC level for all purposes including the § 20a proceeding[2]. Obviously, appellees then had no further remedy than to resort to the courts. The doctrine of estoppel for failure to raise an issue at the administrative level has never been applied to persons denied an evidentiary hearing and the right to submit briefs as were appellees, nor to a case where the agency itself, or a division, raised the issue. The cases cited by the ICC thus are inapplicable, even assuming appellees had not raised the issues of violation of § 5(2) and 20a. Since appellees in fact raised both issues, their standing to review them may not be fairly denied.

The ICC's jurisdictional statement misstates the facts and the law to make it appear that the District Court decided "*sua sponte* issues which were barred to the plaintiff-appellees." (ICC Jurisdictional Statement, p. 17). The question decided in favor of appellees which is the basis of this motion to affirm is, that it is unlawful under § 20a to

---

[1] The full ICC also never considered the effect of the § 5(2) violation on the § 20a application. When it issued the § 20a order it was on the incorrect assumption, previously contested by appellees, that it was correct in overruling Division 4's finding that § 5(2) had been violated.

[2] Appellees first learned that they had been admitted to the § 20a proceedings on May 27, 1955 when they were served with notice to that effect (R. 539-540).

approve issuance of New Common and New Preferred stocks based on $14,700,000 of assets acquired in violation of §5(2).

The cases relied upon by the ICC bar an appeal of issues not raised before the administrative agency "unless there is reasonable ground for failure so to do" (*F. P. C.* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 498-501), because "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." (*U. S.* v. *Tucker Truck Lines*, 344 U. S. 33, 36-37). Applying these criteria, the above facts demonstrate appellees' right to raise these issues on this appeal.

Appellees' standing to sue and review the §20a orders of the ICC has already been specifically upheld by this Court in its prior opinion (*Alleghany Corp. et al.* v. *Breswick & Co. et al.*, 353 U. S. at 159):

> "Alleghany urges initially that the Commission's orders dealing with its status under the Interstate Commerce Act and dealing with its new preferred stock were not reviewable at the suit of appellees, that appellees had no standing. We find that appellees do have standing to challenge these orders. . . . The appellees are common stockholders of Alleghany. The new preferred stock issue approved by the Commission is convertible, and under relevant notions of standing, the threatened 'dilution' of the equity of the common stockholders provided sufficient financial interest to give them standing."

The Court remanded the cause to the District Court, stating:

> "For all these reasons, the judgment of the District Court must be reversed and the case remanded for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act."

The District Court thereupon determined the remanded question in favor of appellees, and voided the ICC orders.[3] Its opinion is set forth at pp. 25-47, and its final judgment at pp. 48-51 of the ICC's jurisdictional statement.

APPENDIX B

The Events After Close of the ICC Record

When appellees herein sought to object to the ICC assuming jurisdiction over Alleghany and approving issuance of the new preferred stock, they were denied a hearing and their objections were summarily overruled. Thereafter they instituted on June 6, 1955 this three-judge court action (R. 32), and while their motion made on June 15, 1955 for preliminary injunction against the jurisdiction-assuming order was *sub judice* (R. 53), Robert R. Young, chairman, and Allan P. Kirby, President, having previously acquired 20% of the old preferred stock caused Alleghany on June 23, 1955 to start issuing the new preferred stock. By this act they hoped to confront the court with the introduction into the stream of commerce of $48,000,000 of unrecallable securities as a *fait accompli*, and thus to make it impossible effectively to give any relief to the appellees and to the Alleghany common stockholders as a class (R. 37, 613, 640-641).

The order to show cause why the motion for preliminary injunction should not be granted was returnable on June 23, 1955. By stipulation of the attorneys for the U. S., the

---

[3] The ICC states that the District Court "lacked power to raise and determine *sua sponte* issues barred to the plaintiff-appellees." There is no such raising or determination here. Appellees alleged before the ICC that § 20a would be violated and, taking cognizance of this Court's subsequent ruling on the § 5(2) issue in 353 U. S. at 161-162, expressly argued in the District Court the theory on which it decided the case. (Plaintiffs' Memorandum dated June 24, 1957, p. 7; and Reply Memorandum, dated August 29, 1957, pp. 61-62, citing *St. Louis-San Francisco Ry. Co. Bonds*, 150 ICC 139, 141.)

ICC and the plaintiffs, orally made in open court on June 21, 1955, the motion was adjourned to June 30, 1955 with the approval of the court per Dimock, D. J. (R. 95-96). At no time did the ICC reveal to the Court that on the very next day following its appearance in support of the government's requested stipulation for adjournment, it would issue a final order approving issuance of the Preferred Stock and denying the request of appellees for a stay of such an order until they could make application to the three-judge court for a restraining order. The record also shows that the final order of June 22 of the ICC was not publicly filed by the ICC until June 23 and that service and notification of its issuance was made on plaintiffs by mail dated June 23, 1955, and received in New York on June 25, 1955. The foregoing facts were alleged in paragraphs 6 and 7 of plaintiffs' supplemental complaint R. 95-6) and were admitted in the answers of both the United States and the ICC (R. 121, 135).

Had not the District Court frustrated this maneuver by its restraining order and injunctions, Young and Kirby and the other preferred stockholders would have received securities with a then current market value of $15,000,000 in *excess* of 100% of their maximum claims as holders of the old preferred stock, and the preferred stock could then have passed into the hands of innocent third parties.

The ICC questions whether the District Court "was precluded from considering" the issues upon which it decided for appellees "by the provisions of paragraph (11) of §20a" (p. 3).[4] The securities which may not be voided

[4] Section 20a(11) provides:

> "• • • any security • • • for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued • • • without such authorization therefor having been first obtained, or if issued • • • contrary to any term or condition of such order of authorization • • •; but no security issued • • • shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization." [49 USC 20a(11)]

under § 20a(11), assuming a rescission is a voiding,[5] are only those that would be "rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order * * *." This, we submit, refers to a "failure" by the issuer and not to a failure by the ICC to make a valid order.[6]

At the present stage of this case review is limited to the ICC record and does not include events after that record was closed. Presumably in recognition of this fact, the District Court refused to grant or at least deferred action on appellees' motion for a mandatory injunction to restore the *status quo ante*. Alleghany's delivery of 900,000 shares of the new preferred stock to the now frozen old preferred stockholders, and to return their old stock to the holders of deposit receipts for the remaining 400,000-odd shares.[7] It is well established that compliance with an administrative order does not limit its review (*Chicago Junction* case, 264 U. S. 258, 269-270; *South Carolina Public Service Authority* v. *S. E. C.*, 170 F. 2d 948, 952).

Finally, it is the Urgent Deficiencies Act, not § 20a(11), which determines the scope of review. Pursuant to that Act, this Court voided part of a § 20a order in *U. S.* v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 282 U. S. 311.

---

[5] See fn. 7, *infra*.

[6] Failure to make the requisite findings in the order itself pursuant to § 20a(2) standards obviously would not be exculpated and neither the ICC nor Alleghany so contend.

[7] (Unprinted record, plaintiffs' motion dated June 14, 1957, and plaintiffs' rejected order on settlement of final judgment). For details of Alleghany's attempt to present this Court and the lower court with a *fait accompli* by disrupting the *status quo*, see Brief for Appellees, No. 36, October Term, 1956, at pp. 15-16, 19-20, 127-129.

LIBRARY
SUPREME COURT, U.S.

No. 617

Supreme Court, U.S.
FILED
NOV 14 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER, and ALVIN J. DELAIRE, a copartnership doing business as Gruss & Co.,

Appellants,

v.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION AND APPLICATION FOR SUMMARY REVERSAL

HAROLD H. LEVIN,
300 Park Avenue,
New York 22, New York,
Attorney for Appellants,
JOSEPH S. GRUSS, *et al.*

JOSEPH M. PROSKAUER,
MARVIN E. FRANKEL,
ALLEN L. FEINSTEIN,
Of Counsel.

TABLE OF CONTENTS

	PAGE
Opinion Below and Prior Opinions	2
Jurisdiction	2
Question Presented	2
The Interest of These Appellants and Their Application for Summary Reversal	3
Statutes Involved	4
Statement	4
I. Proceedings before the ICC	4
II. Prior proceedings and earlier judgment (since reversed) in the District Court	5
III. The decision of this Court	7
IV. Proceedings in the District Court on remand	9
The Question is Substantial and Summary Reversal is Appropriate	10
I. The District Court Misconceived and Violated the Terms of this Court's Remand	12
II. The District Court Misinterpreted Section 5(7), (8), and (9) of the Interstate Commerce Act, as Discussed by this Court on the Prior Appeal	16
III. The Continuing Injury to the Preferred Shareholders Resulting from the District Court's Patent Error Supports the Plea for Summary Reversal	19
Conclusion	20
Appendix A	21
Appendix B	44

Table of Cases Cited

	PAGE
Aircraft & Diesel Corp. v. *Hirsch*, 331 U. S. 752, 767	17
Alleghany Corp. v. *Breswick & Co.*, 353 U. S. 151	2
Baltimore & Ohio Railroad Co. v. *United States*, 279 U. S. 781	2
Chicago Junction Case, 264 U. S. 258	2
Federal Power Commission v. *Idaho Power Co.*, 344 U. S. 17, 21	17
Federal Trade Commission v. *Klesner*, 280 U. S. 19, 25	17
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141	17
Hourihan v. *National Labor Relations Board*, 201 F. 2d 187 (D. C. Cir.), certiorari denied, 345 U. S. 930	17
Labor Board v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18	17
Securities Comm'n v. *Chenery Corp.*, 318 U. S. 80, 88	16
United States v. *I. C. C.*, 337 U. S. 426, 443	18
United States v. *Lowden*, 308 U. S. 225	2
United States v. *Marshall Transport Co.*, 322 U. S. 31	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ____

JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER, and ALVIN J. DELAIRE, a copartnership doing business as Gruss & Co.,

Appellants,

v.

BRESWICK & Co., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION AND APPLICATION FOR SUMMARY REVERSAL

Appellants appeal from the judgment of the United States District Court for the Southern District of New York, entered on October 17, 1957, setting aside orders of the Interstate Commerce Commission, which approved the issuance of certain securities by the Alleghany Corporation, and enjoining acts of the defendants in furtherance thereof, and submit this Statement (1) to show that this Court has jurisdiction of the appeal and (2) to seek summary reversal of the judgment below on the grounds that it is clearly erroneous and contrary to the decision of this Court upon the earlier appeal herein (353 U. S. 151).

Opinion Below and Prior Opinions

The opinion below (Appendix A, *infra*, pp. 21-40) is not yet reported. The opinion of this Court, reversing and remanding the lower court's earlier judgment which set aside the orders of the Interstate Commerce Commission, is reported at 353 U. S. 151. The reports and orders of the Commission and the opinions below preceding the first appeal to this Court (134 F. Supp. 132, preliminary injunction; 138 F. Supp. 123, final injunction) were reproduced in the papers on that appeal, Nos. 36, 82, and 114, last Term, to which the Court is respectfully referred.

Jurisdiction

This suit was brought under 28 U. S. C. §§ 1336, 1398, 2284, and 2321-2325 to set aside orders of the Interstate Commerce Commission. The judgment of the District Court (Appendix A, *infra*, pp. 41-43) was entered on October 17, 1957, and notice of appeal was filed in that court by the appellants herein on October 29, 1957. The jurisdiction of this Court to review on direct appeal the decision of the District Court is conferred by 28 U. S. C. §§ 1253 and 2101(b). Cases sustaining the jurisdiction of this Court on such direct appeal include *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151; *United States* v. *Marshall Transport Co.*, 322 U. S. 31; *United States* v. *Lowden*, 308 U. S. 225; *Baltimore & Ohio Railroad Co.* v. *United States*, 279 U. S. 781; *Chicago Injunction Case*, 264 U. S. 258.

Question Presented

Whether the District Court violated the mandate of this Court and the Interstate Commerce Act in holding that the stock authorization orders of the Interstate Commerce Commission under Section 20a of that Act, though valid in all other respects, should be annulled on the theory that the

Commission was required to approve Alleghany's control of the New York Central Railroad System before it authorized the preferred stock issue.[1]

The Interest of These Appellants and Their Application for Summary Reversal

The appellants herein are preferred shareholders of the Alleghany Corporation who, with thousands of others similarly situated, exchanged their shares for the new ones approved by the Interstate Commerce Commission and have had their investment substantially frozen by this litigation since June of 1955. The continuing injury they suffer has been recognized in the court below and was a decisive factor in Mr. Justice Harlan's granting of a partial stay over two years ago (see pp. 6, 18-19, *infra*).

We believe that the court below, following reversal of its prior judgment by this Court, has rendered a decision which can be demonstrated with certainty to be in complete variance with the opinion and judgment of this Court on the prior appeal. We propose to show that the decision below rests upon a determination explicitly considered and foreclosed by this Court—a determination neither contem-

---

[1] Comprised under this question are the following subsidiary questions presenting additional or related grounds on which reversal of the judgment below is believed to be warranted:

(1) Whether the District Court was precluded under Section 20a of the Interstate Commerce Act from enjoining the stock issue for the reasons stated in its opinion.

(2) Whether Section 5 of the Interstate Commerce Act required approval by the Interstate Commerce Commission of Alleghany's control over the New York Central Railroad System.

These specific questions will be argued if the Court determines that the case requires briefs and argument. In this Statement, however, without detailing these further assertions of error by the court below, we focus on points believed sufficient in themselves to justify reversal without further briefs or argument.

plated nor permitted by this Court's remand solely "for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act."

Considering the several arguments "not previously discussed" with which appellees attacked the propriety of the stock issue, the District Court concluded that the merits of the stock issue as such were for the Commission's judgment and that there were no grounds for interfering with that judgment. However, on the ground that the Commission had failed to approve Alleghany's control over the New York Central, a point previously discussed both below and here, and which this Court had declared it unnecessary to decide, the District Court once again enjoined the long-suspended stock issue.

In the unusual circumstances of this second appeal, we believe a request for summary reversal to be appropriate.

Statutes Involved

Sections 5(2), (3), (4), (7), (8), (9), (11) and 20a of the Interstate Commerce Act (49 U. S. C. §§ 5(2), (3), (4), (7), (9), (11) and 20a) are set forth in Appendix B, *infra*, pp. 44-52.

Statement

The pertinent facts, already considered by this Court less than a year ago, may be summarized as follows:

I. *Proceedings before the ICC.*

On September 17, 1954, the Alleghany Corporation, the New York Central Railroad Company, the Cleveland Cincinnati, Chicago and St, Louis Railroad Company (Big Four), and the Louisville and Jeffersonville Bridge & Railroad Company (Jeffersonville) jointly applied to the Commission under Section 5(2) of the Interstate Commerce

Act for approval and authorization of certain merger and lease transactions and for continuation of Alleghany's status as a carrier subject to the provisions of Section 20(1) to (10), inclusive, and 20a(2) to (11), inclusive of the Interstate Commerce Act. The application stated, *inter alia*, that Alleghany had recently acquired control of the Central as the result of a proxy contest and that Central controlled Big Four.

On March 2, 1955, the Commission's Division 4 issued its report holding that (1) Alleghany controlled Central, as the application had shown, (2) the merger and lease of the Jeffersonville properties required Commission approval under Section 5(2) of the Act and warranted such approval as being consistent with the public interest, and (3) Alleghany was a non-carrier which should "be considered as a carrier subject to * * * section 20a(2) to (11), inclusive, of the Interstate Commerce Act * * *." 290 I. C. C. at 725.

On May 24, 1955, the full Commission affirmed these rulings of Division 4. It held, moreover, that Alleghany's acquisition of control over Central, an integrated carrier system, had not required its approval under Section 5(2) of the Act.

In the meantime, on February 18, 1955, Alleghany applied to the Commission for an authorization under Section 20a of the Interstate Commerce Act to issue a new 6% convertible preferred stock, pursuant to a charter amendment approved by all classes of its stockholders, in exchange for its outstanding shares of 5½% Series A preferred. On May 26, 1955, Division 4 issued its report approving the new issue, with one change in the exchange plan. In an order of June 22, 1955, the full Commission denied reconsideration.

II. *Prior proceedings and earlier judgment (since reversed) in the District Court.*

On June 6, 1955, appellees filed their complaint in the court below attacking the Commission's "status orders" of March 2 and May 24, 1955. In a supplemental complaint on

July 7, 1955, they sought nullification of the preferred stock orders of May 26 and June 22, 1955.

On June 23, 1955, District Judge Dimock issued a temporary restraining order against the issuance, transfer or distribution of Alleghany's new 6% preferred stock.

On July 26, 1955, the three-judge District Court granted a preliminary injunction (with Circuit Judge Hincks dissenting) against both the status orders and the stock orders of the Commission. 134 F. Supp. 132. Stating that he was "most impressed with the prejudice which continuance of the injunction will work on the preferred stockholders" (75 S. Ct. 912, 916), Mr. Justice Harlan, on August 3, 1955, stayed this injunction as to the portion of the new preferred delivered prior to Judge Dimock's restraining order. As this Court has noted, however (353 U. S. at 159, n. 4), the New York Stock Exchange continued (and still continues) to suspend trading in this stock pending this litigation.

On November 18, 1955, the three-judge court (with the late Judge Frank sitting in place of Judge Hincks) concluded that the temporary injunction should be made permanent, staying enforcement in accordance with the partial stay granted by Mr. Justice Harlan, 138 F. Supp. 123.

In its opinion granting the preliminary injunction, the District Court held, so far as is now material, that:

> "(1) The Alleghany application of September 17, 1954, seeking approval of the merger and lease transactions, did not present the kind of acquisition of control requiring or warranting the Commission's status orders under Section 5(2) of the Act. 134 F. Supp. at 142-3.
>
> (2) The Commission had erred in concluding that Alleghany's acquisition of control over Central did not require approval under Section 5(2). *Id.* at 143-5.

Characterizing the Commission's views on these points as a "double misinterpretation" (*id.* at 144), the District Court concluded (*id.* at 145):

> "Under our interpretation of the statute the I. C. C. could not have made a finding of control without approving control; yet it failed to make the prerequisite

finding that the control was 'consistent with the public interest' required by subdivision (b) of section 5(2). The case must go back for consideration of that question if Alleghany persists in its claim that it has acquired control of New York Central and in its desire for a declaration of its right to be 'considered as a carrier.' "

In its opinion granting a permanent injunction (138 F. Supp. 123), the District Court adhered "for the most part" (p. 127) to its earlier rulings, but reached a more drastic conclusion as to the consequences of the Commission's failure to consider and approve Alleghany's acquisition of control over Central. This omission, the court now held, left the Commission without "jurisdiction under Section 5(3)" (*id.* at 128), with the result that a final judgment was required setting aside both the status and the stock orders. Alternatively, however, the court said in Appendix II to its opinion (*id.* at 136):

> "If we are wrong, however, in this holding that the I. C. C. is without jurisdiction, the case should be remanded for the determination of (1) whether Alleghany does control Central and (2) whether such control is in the public interest."

III. *The Decision of this Court.*

Listing the three questions to be considered in determining whether the Jeffersonville transaction justified the Commission's assertion of jurisdiction under Section 5(2) of the Act, this Court stated the first as being (353 U. S. at 161):

> "Was Commission approval of Alleghany's acquisition of control over Central required?"

This Court then described the pertinent ruling of the District Court as follows (*ibid.*):

> "The District Court held that whatever control Alleghany had over Central did not fit within the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' because the Commission had not given the approval necessary for acquisition of control of Central and its subsidiaries, 'two or more carriers.' "

In its reversal of the District Court, this Court went on to discuss, but found it unnecessary to decide, the question whether Alleghany's control over Central required Commission approval. For, the Court said (*id.* at 161-2),

> "even if such approval is necessary, the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' refers to 'control' and not to 'approved control.' There seems to be no reason to read in the word 'approved.' Such a holding would mean that the failure of a company engaging in a transaction requiring Commission approval to apply for that approval would deprive the Commission of jurisdiction. Remedies against a violator are provided by § 5(7), (8), and (9) of the Act. To punish a violator by depriving the Commission of jurisdiction over it would be indeed quixotic. As the Commission points out, the problem would appear clearer were Alleghany contesting, rather than acquiescing in, its jurisdiction."

While Mr. Justice Douglas (joined by the Chief Justice and Mr. Justice Black) dissented on other grounds (353 U. S. at 175-9), there was no disagreement on the foregoing conclusion, which has now become the decisive point in the case.

In addition to this point, this Court also held in the first appeal that (1) the Commission was correct in finding that Alleghany controlled Central,[2] (2) the Jeffersonville proceeding presented an "acquisition of control" requiring Commission approval under Section 5(2) of the Act,[3] (3) appellees were not entitled to an evidentiary hearing in the merger-status order proceeding, and (4) appellees' claim of a right to a hearing in the preferred stock proceeding was "governed by § 20a(6) of the Act, which provides that 'The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority'" (353 U. S. at 175).

---

[2] The dissenting opinion was in agreement on this point, 353 U. S. at 176.

[3] This, as we read the opinions, was the point on which the Court divided.

Accordingly, this Court concluded that (*ibid.*) "the judgment of the District Court must be reversed and the case remanded for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act."

IV. *Proceedings in the District Court on remand.*

On the remand, the record before the District Court was, with slight and immaterial additions, the same as that which had been before this Court.[4] Answering appellees' attacks on the merits of the preferred stock exchange plan approved by the ICC, the District Court held that the questions thus presented "were within the range of expert judgment reserved to the Commission; that its findings thereon satisfy the statute [Section 20a]; and that we may not substitute our views for those it expressed." (Appendix A, *infra*, p. 24.) The Court also rejected claims that the Commission had erred in (1) its change in the conversion date of the plan as submitted by Alleghany and (2) the denial of appellees' request for an evidentiary hearing in the preferred stock proceeding. (*Infra*, pp. 24-5.)

The District Court concluded, however (*infra*, p. 25), that the Commission's stock order must be set aside because of

> "the need for validation of Alleghany's acquisition of the Central system as a prerequisite to the Commission's grant of the relief requested."

Noting that under this Court's decision such "need for validation" could not be viewed as a defect in the Commission's jurisdiction, the District Court described its ground

---

[4] The only additions, none of any consequence here, were the papers submitted in support of motions to make the judgment of this Court the judgment of the lower court and for disposition of the sole remaining issue remanded by this Court.

of decision now as turning on "the question of findings necessary as a preliminary to relief on the merits, action necessary if the order of the Commission is to conform with the Interstate Commerce Act." (*Infra*, p. 25.)

Explaining its conclusion, the District Court said (*infra*, p. 30):

> "The approval of acquisition and continued control is an obvious first question in any application by Alleghany because unless the Commission intends to approve this control it would be regulating a company which should be properly under the control of another agency; it would be granting a wrongdoer sanctuary from the Investment Company Act; and it would be authorizing and ordering acts in aid of a known violation of the Interstate Commerce Act."

In answer to the argument that its conclusion was inconsistent with this Court's ruling that there was no need to decide whether Alleghany's acquisition of control over Central required Commission approval, the District Court said (*infra*, pp. 30-31) that this Court's holding

> "did no more than establish the jurisdiction of the Commission and the validity of the status order. The Court dealt with measures it believed necessary to protect the public from evasion of the Act by a possible wrongdoer. It did not suggest that the wrong be overlooked or that in the absence of any finding that the public interest compelled such action, relief be granted for the benefit of the wrongdoer notwithstanding his wrong." [Footnotes omitted.]

The Question is Substantial and Summary Reversal is Appropriate

This Court, in reversing the lower court's earlier judgment, remanded only the question whether "the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act." 353 U. S. at 175. Con-

sidering appellees' several objections as to the wisdom and the propriety of the stock issue itself, the District Court concluded that these were all matters for the Commission's judgment and that there was no ground for disturbing that judgment.

Nevertheless, though it had been directed by this Court to consider on the remand only a narrow claim "not previously discussed," the District Court then proceeded to reformulate a point which was discussed at length in its earlier opinions as a basis for its first erroneous judgment and which was expressly considered and found unnecessary for decision by this Court. The District Court has acknowledged (*infra*, pp. 25, 34-5, n. 2) that this Court's decision erased the contention that Commission "validation" of Alleghany's control over Central was a "jurisdictional" prerequisite to the stock order. It has held, nevertheless, that such validation remained "an obvious first question in any application by Alleghany" (*infra*, p. 30). The result, we submit, is a plain departure from the mandate of this Court; however the point is phrased, the court below has reinstated as a "first question" an issue which this Court eliminated as an "unnecessary" question.

It seems equally clear, moreover, that the three-judge court has exceeded its competence in reaching out and attempting by indirection to compel the Commission to proceed under Section 5(7) of the Interstate Commerce Act—a provision which merely says the Commission is "authorized, upon complaint or upon its own initiative without complaint," to take action of the kind the lower court has in effect commanded.

Because the error of the District Court seems clear, because the prolongation of this litigation has worked severe and unquestioned hardships upon the present appellants and many others, and because the Commission's orders have been amply reviewed and found proper in all material respects, we respectfully submit that this is a proper occasion for summary reversal of the decision below.

I

The District Court Misconceived and Violated the Terms of this Court's Remand.

The earlier opinions in this case, both here and in the court below (see pp. 6-9, *supra*), and the opinion of the District Court on remand serve, in our view, as ample demonstration that the District Court has misunderstood this Court's mandate. To be sure, the District Court has proposed a distinction between this Court's holding that the control-of-Central question made no difference for purposes of ICC "jurisdiction" and the view that this was a basis for nullifying the agency's action on the "merits." But we think it clear that this is a semantic distinction without a difference, that the District Court's latest action merely rephrases a result barred by this Court, and that any other view renders the earlier appeal largely futile.

That the present decision actually reinstates a holding which was reversed by this Court is made especially clear by the fact that the District Court was careful in its earlier opinion to make this very point *both in jurisdictional and in non-jurisdictional terms.* As we have noted, the District Court said in the opinion announcing the decision reversed by this Court (138 F. Supp. at 136):

> "If we are wrong, however, in this holding that the I. C. C. is without jurisdiction, the case should be remanded for the determination of (1) whether Alleghany does control Central and (2) *whether such control is in the public interest.*" (Emphasis added.)

If that alternative holding—that the Commission was required, *on non-jurisdictional grounds,* to determine whether Alleghany's control of Central was proper—had been correct, this Court could not have reversed and held this very question of approval of control unnecessary to decision. Thus, the very thoroughness and precision of the District Court's earlier opinion serve to demonstrate its repetition of its earlier error on the remand.

The identity of the lower court's latest ruling with the one this Court reversed extends to a close identity in language and reasoning. In the earlier proceedings, the District Court charged that the Commission had sought to "escape any responsibility as to the acquisition of the Central by Alleghany and focus public attention only upon the merger of the Louisville and Jeffersonville Bridge & Railroad Company into the Big Four, all the while *trying to keep regulatory control of Alleghany and thus preclude any consideration of the matter by the S. E. C.*" 134 F. Supp. at 144 (emphasis added).

Now, again, though couching its result in terms of the merits rather than jurisdiction, the District Court concludes that, unless it first approved the acquisition of Central control, the Commission "would be regulating a company which should be properly under the control of another agency; it would be granting a wrongdoer sanctuary from the Investment Company Act" (*infra*, p. 30). Earlier in this most recent opinion, the District Court likewise emphasizes the view, repudiated by this Court, that Alleghany "upon the basis of this violation [namely, failure to obtain approval of control over Central] • • • now claims the advantage of less rigidly restricted financing which the Investment Company Act intended only for a person who had previously satisfied the Interstate Commerce Commission that his control of a carrier would be consistent with the public interest." (*Infra*, p. 29.)

There is no meaningful difference, we submit, between the District Court's original view that "the I. C. C.'s power to authorize the issuance of the preferred stock depended upon the existence of a valid order authorizing Alleghany to acquire control of a carrier or carriers" (138 F. Supp. at 139) and its conclusion on the remand that "approval of acquisition and continued control is an obvious first question in any application by Alleghany" (*infra*, p. 30). Both formulations are equally inconsistent with this Court's holding that there was no need to determine whether Alleghany's control over Central required Commission approval.

True, the District Court's holding is now phrased in terms of the substantive "public interest" standards to be followed by the Commission rather than in terms of the agency's "jurisdiction." But the result is not different in any material respect from the earlier one rejected by this Court. Indeed, the appellees themselves recognized fully on the first appeal that any such conclusion via the "public interest" route had been foreclosed here. In their petition for a rehearing by this Court, they said (p. 3):

> "The effect of the majority opinion [of this Court] is to permit Alleghany to use its unlawful control of Central for self-aggrandizement, and to deprive Alleghany's stockholders of protections enacted for their benefit by the Congress in the Investment Company Act. Neither result can conceivably be 'consistent with the public interest.'"

While we disagree, of course, as this Court did, with the quoted argument, we think it fairly represents a view which this Court rejected. And while the argument there was posed in terms of Section 5(2), its failure entails equally the defeat of the substantially identical "public interest" position revived by the District Court under 20a.

The District Court was led astray, we suggest, in construing this Court's observation that "control," not "approved control," was a sufficient condition of Commission jurisdiction. 353 U. S. at 161-2. In this connection, this Court said (*id.* at 162):

> "To punish a violator by depriving the Commission of jurisdiction over it would be indeed quixotic. As the Commission points out, the problem would appear clearer were Alleghany contesting, rather than acquiescing in, its jurisdiction."

Reasoning that the Commission's stock order is "for the private benefit of Alleghany" (*infra*, p. 28), the District Court concluded (*infra*, p. 29) that "a person in illegal control of a carrier * * * might be subject to all the burdens and duties imposed by the Act upon a person in legal con-

trol, but relief or benefit for such a person may not be rationally authorized under the Act, except upon finding that the public interest required such authorization notwithstanding that person's violation of the Act."

Thus, the District Court read this Court's finding of Commission jurisdiction to mean only a kind of "one-way jurisdiction"—jurisdiction to impose "burdens and duties" but none for "relief or benefit." Building upon this Court's illustration of the situation "were Alleghany contesting" jurisdiction, the lower court overlooked the fact that this Court's decision was in a case where Alleghany was in fact "acquiescing," and in this way rendered the successful appeal of Alleghany and the other defendants a futility. We submit that this was plain error.

Nor is the error cured by the suggestion of the court below (*infra*, p. 31) "that although there might be circumstances when such action [authorization of a stock issue] could reasonably be taken before approving the acquisition of control over the Central system, there were no findings of facts which justify such action in the present case." While this approach is in line with the view that the decision now is on the "merits" rather than on "jurisdiction" of the Commission, the clash with this Court's decision remains clear.

It is no answer to say that in some undefined, hypothetical case the threshhold block originally interposed by the District Court, removed by this Court, and now reinstalled could be surmounted, and that this sufficiently meets this Court's ruling that the block is not "jurisdictional." For this Court's upholding of the Commission and the other appellants on this issue is almost wholly divested of meaning if the lower court remained free to demand some findings not required by this Court as a condition precedent to approval of the stock issue. The decisive point is that the question held by this Court to be unnecessary to decision in *this case* has been held on remand to be dispositive.

II

The District Court Misinterpreted Section 5(7), (8), and (9) of the Interstate Commerce Act, as Discussed by this Court on the Prior Appeal.

Assuming, as the court below has held, that Alleghany's control over Central required authorization by the Commission and was therefore "unlawful" under Section 5(4) of the Interstate Commerce Act (see Appendix A, *infra*, p. 27; Appendix B, *infra*, p. 46), this Court pointed out on the first appeal (353 U. S. at 162) that "Remedies against a violator are provided by § 5(7), (8), and (9) of the Act." Misinterpreting the significance of the reference to these provisions and overlooking the sharp boundaries of its functions as a three-judge court, the District Court proceeded to "intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Securities Comm'n* v. *Chenery Corp.*, 318 U. S. 80, 88.

Thus, the District Court began with the premise (*infra*, p. 27) that Section 5(7) "*mandates* action by the Commission to compel correction of violations of" 5(4) (emphasis added). But Section 5(7), quoted by the court immediately thereafter, "mandates" nothing; instead, it declares that the "Commission is *authorized*, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4) * * *." (Emphasis added.)

Building upon its reading of "authorized" as "mandated," the District Court then overlooked entirely the following subdivision of Section 5, which leaves no doubt that Congress provided for initiative by the Commission, not

by the courts (and certainly not by a three-judge court). Section 5(8) provides (Appendix B, *infra*, p. 47):

> "The district courts of the United States shall have jurisdiction *upon the complaint of the Commission*, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process • • • as may be necessary to restrain such person from violation of such provision or to compel obedience to such order." (Emphasis added.)

Here is a familiar type of enforcement scheme designed by Congress to commence only with an administrative decision to act. In such a division of administrative and judicial functions, the administrative judgment against taking action "is final." *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 25; *Labor Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18; *Hourihan* v. *National Labor Relations Board*, 201 F. 2d 187 (D. C. Cir.), *certiorari denied*, 345 U. S. 930. The court below, reaching out to upset that judgment by indirection in a manner nowhere authorized by the Interstate Commerce Act, has in effect undertaken "to exercise an essentially administrative function." *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 21. In this, we submit, the court below violated both the judgment of this Court in this case and the more general duty of "due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141; cf. *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 767.

The District Court recognized, and proffered an explanation of, its departure from the division of functions

specified by Congress. It said (Appendix A, *infra*, pp. 27-8):

> "Ordinarily, if the facts were less conclusive, the Commission would commence its own investigation concerning Alleghany's application. Here, however, there is no question of further investigation; the facts are undisputed; the Commission's findings are complete. * * * The question is simply one of law."

The fallacy in this analysis, we believe, is that Congress nowhere suggested any such law-fact dichotomy as a basis for transferring the Commission's powers to the courts. The Commission's "exclusive and plenary" authority under Section 5[5]—and the corollary provision for judicial action only at the instance of the Commission—extends to issues of law as well as fact. There is no ground for the view that a court may intervene and control the Commission's authority to "investigate and determine"[6] merely because it believes that the Commission's failure to invite such intervention stems from a mistaken view of the law.

The error is compounded further, we think, because of the limited character of the three-judge court's functions under the Urgent Deficiencies Act. Congress not only limited judicial action under Section 5(4), (7), and (8) of the Interstate Commerce Act to proceedings "upon the complaint of the Commission"; it also provided that this restricted role was to be played by the regular "district courts of the United States," not specially constituted three-judge courts.

This Court has "frequently pointed out the importance of limiting the three-judge court procedure within its expressly stated confines." *United States* v. *I. C. C.*, 337 U. S. 426, 443, and cases cited. In undertaking to make a

---

[5] Section 5(11).

[6] Section 5(7).

determination under Section 5 which Congress has left for the Commission, the District Court exceeded these long-standing restrictions.

III

The Continuing Injury to the Preferred Shareholders Resulting from the District Court's Patent Error Supports the Plea for Summary Reversal.

Over two years ago, in granting a partial stay of the District Court's preliminary injunction, Mr. Justice Harlan observed that he was "most impressed with the prejudice which continuance of this injunction will work on the preferred stockholders." 75 S. Ct. at 916. Similarly, Judge Dimock recognized "the plight of innocent stockholders who have given up their old preferred stock and have got a frozen asset in return" (Transcript of Record, p. 641, Nos. 36, 82 and 114, last Term, opinion denying request for stay). And see the references to these same hardships in the dissents of Judge Hincks. *Id.* at 635-6, 637, 642.

These hardships, aggravated by long duration, persist and mount so long as the present litigation continues. It is undisputed that, apart from the injuries to other parties, the present appellants and thousands of other preferred stockholders similarly situated continue to hold investments which are substantially frozen—suspended from Stock Exchange trading, largely or wholly non-pledgeable, non-productive, defenseless against the vagaries of the market.

We mention these facts in the belief that, if we are correct in the view that the District Court has plainly erred, they help to justify the summary reversal and termination of this litigation for which this Statement prays.

Conclusion

The question presented is at least substantial and warrants the noting of jurisdiction by this Court.

Moreover, with all deference to the distinguished bench below, and mindful of the extraordinary nature of such a request, we believe that the District Court has so clearly misunderstood the decision of this Court and the pertinent statute as to warrant reversal here without further briefs or argument. Accordingly, the judgment below should be reversed with directions to dismiss appellees' complaint.

Respectfully submitted,

HAROLD H. LEVIN,
800 Park Avenue,
New York 22, New York,
Attorney for Appellants,
Joseph S. Gruss et al.

JOSEPH M. PROSKAUER,
MARVIN E. FRANKEL,
ALLEN L. FEINSTEIN,
Of Counsel.

November, 1957.

APPENDIX A

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BRESWICK & Co., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated, *Plaintiffs,* *against* UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ALLEGHANY CORPORATION, et al., *Defendants.*	CIV. 101-114

BEFORE:

CLARK, Circuit Judge and

DIMOCK and WALSH, District Judges

APPEARANCES:

ROSSTON, HORT & BRUSSEL, ESQS. (GEORGE BRUSSEL, JR., and EUGENE G. KING, Of Counsel) for Breswick & Co. and Myron Neisloss

RANDOLPH PHILLIPS, Pro Se

ROBERT W. GINNANE, ESQ., General Counsel for Interstate Commerce Commission (B. FRANKLIN TAYLOR, JR., Assistant General Counsel, with him on the brief)

NOTE: Footnotes are printed following text of opinion.

SIMPSON, THACHER & BARTLETT, ESQS.,
WHITE & CASE, ESQS.,
WHEELER & WHEELER, ESQS., (WHITNEY NORTH SEYMOUR, DAVID HARTFIELD, JR., EDWARD K. WHEELER, and DAVID W. WALLACE, Of Counsel) for Alleghany Corporation

PROSKAUER, ROSE, GOETZ & MENDELSOHN, ESQS., (HAROLD H. LEVIN, MARVIN E. FRANKEL and ALLEN J. FEINSTEIN, Of Counsel) for Defendants Joseph S. Gruss, et al.

EDWARD M. GARLOCK, ESQ., for Defendants Baker, Weeks & Co., Oscar Gruss & Son, Irving Neuman as Trustee under a Deed of Trust dated November 6, 1943, and Edward Gornish.

SAMUEL A. MEHLMAN, Pro Se

ALEXANDER KAHAN, ESQ., and,
A. LICHTENSTEIN, ESQ., (ALEXANDER KAHAN, Of Counsel) for Adelaide Neuwirth and common stockholders of Alleghany Corporation, representatively.

WALSH, D.J.

Plaintiffs, common stockholders of Alleghany Corporation, by this action seek review of an order of the Interstate Commerce Commission authorizing Alleghany to issue certain stock.[1] We had previously held that the Commission lacked jurisdiction to promulgate the order and that the issue was subject to the Investment Company Act. The Supreme Court reversed this holding and held that the issue was subject to the Interstate Commerce Act. It remanded the case to us for consideration of plaintiffs' claim that the issue violated that Act.[1a]

The stock in controversy consisted of 1,367,440 shares of 6% preferred stock having a par value of $10 to be offered ten for one in exchange for the pre-existing 5½% preferred, having a par value of $100. It was to be convertible at the option of the holder into common stock,

according to a formula which resulted in an actual conversion ratio of 4.7 shares of common for each share of new preferred, upon payment to the corporation of $3.75 per common share. The issue of the common stock necessary for conversion was also authorized.

Plaintiffs contend that the Commission's findings as to the fairness of the issue are inadequate and are in conflict with undisputed facts. They claim in substance that the worth of the old preferred was overestimated by giving it a value of $100 par value, plus $5 redemption premium, plus $132 accumulated dividends; that it was improper to include the redemption premium and to assume that the dividends would be readily payable in cash. They suggest that the market value, which never previously exceeded 170, was more realistic and should have been used. They also claim that the value of the new preferred was underestimated; that in particular the value of the fifteen year non-call period allowed for conversion was overlooked entirely, although it became markedly apparent when, after the plan of exchange was announced, the market price of the preferred exceeded the $237 value assumed for purposes of the exchange, by almost fifty percent. In other words whereas the old preferred had never sold above $170 prior to the announcement of the plan, its equivalent in the new preferred traded upon a "when issued" basis rose to 352½ prior to the suspension of trading. They claim that the excess of 352½ over 170 represents a "premium" to the preferred stockholders, an excessive benefit at the expense of the corporation and also the common stockholders.

In answer it is contended that the offer of the exchange was the only feasible way in which to get rid of the burden of accumulated dividends without requiring a large outlay of cash; that the benefits to be given the new preferred in order to make the exchange attractive was primarily a matter of business judgment; that the market action of the preferred does not indicate that an excessive premium was given it at the expense of the common because a substan-

tial part of the increase paralleled an increase in the common into which the new preferred was convertible.

As to these contentions of the plaintiffs, we believe that the facts disclosed to the Commission and available as matters of public knowledge were enough to put an expert body on notice of all the alleged undesirable qualities of the issue; that the questions so raised were within the range of expert judgment reserved to the Commission; that its findings thereon satisfy the statute; and that we may not substitute our views for those it expressed.

Plaintiffs also protest that the Commission conditioned its approval upon the change in plan never ratified by the stockholders. The proposed plan had provided that the conversion ratio should be fixed as of the fifth market day following Commission approval. The Commission conditioned its approval upon modification of the exchange offer so that the conversion ratio would be fixed as of the last market day preceding its order. The Commission has power to grant the application "upon such terms and conditions as the commission may deem necessary or appropriate in the premises". 41 Stat. 394, 49 U. S. C. § 20a(3). The question whether the exchange would involve a violation of some contractual arrangement with the stockholders is not before us. This contention does not affect the validity of the Commission's order.

As to matters of procedure, plaintiffs complain that they were entitled to an evidentiary hearing before the Commission and that they were deprived of that right. This point was raised before the Supreme Court and, if not decided adversely to them, we understand the Supreme Court's statement that the point is governed by section 20a(6) of the Interstate Commerce Act, 41 Stat. 439, 49 U. S. C. § 20a(6), to restrict our consideration to the effect of that section. Under that section the Commission has almost free discretion as to how it may best proceed with its investigation. It was not required as a matter of law to hold evidentiary hearings to enable plaintiffs to amplify by cross-examination of corporate officers points already

ascertainable from facts before it. Plaintiffs urge the admitted complexity of the plan and the heavy investment in preferred stock by the dominant officer of Alleghany just before announcement of the plan. They also show that by refusing to thus open its investigation the Commission apparently missed evidence subsequently supplied to the Securities and Exchange Commission, such as a memorandum from Alleghany's files discussing the value of the non-call period, the minutes of the board meeting which are said to show that this feature was not in the plan when originally approved, and an analysis of the market action of earlier conversion warrants which might have foretold the market action of the preferred after the present plan closed. Loss of this type of evidence is, however, a known risk which an agency takes when it declines to open its investigation to controversy. The Commission is given that power by statute.

There nevertheless does remain a major problem—the need for validation of Alleghany's acquisition of the Central system as a prerequisite to the Commission's grant of the relief requested. We do not raise again the question of jurisdiction;[2] but we now raise the question of findings necessary as a preliminary to relief on the merits, action necessary if the order of the Commission is to conform with the Interstate Commerce Act.

The facts now established are that Alleghany has control of the New York Central and that the Central is itself a carrier with control of a large number of other carriers. The Commission was never asked to approve Alleghany's acquisition of control over this group of carriers and has carefully refrained from so doing.[2a]

This problem presents two separate questions: (1) does the acquisition of an already integrated system of separately existing carriers require Commission approval under subdivision 2 of section 5; and (2) if it does, may the Commission proceed to regulatory determinations, deferring meanwhile the question of whether it will authorize the continuation of this control, upon which its jurisdic-

tion over Alleghany depends. The second question becomes more pointed where, as here, the assumption of regulatory responsibility by the Commission shields the person guilty of the unapproved acquisition from regulation by another agency.

With respect to the first question, until this case arose, it had been the consistent view of the Commission that its approval of such an acquisition of control and its finding of consistency with the public interest was required. *Arkansas & L. M. Ry. Co.-Control*, 281 I. C. C. 254; *Weinstein-Control-Capital Transit Co. and Montgomery*, 56 M. C. C. 127; *Seaboard Air Lines Ry. Co.-Receivership*, 261 I. C. C. 689. This view was well expressed by Division 4 in its opinion with respect to Alleghany's application for authority to merge one of the Central's subsidiaries, the Louisville & Jeffersonville Bridge and Railroad Company, 290 I. C. C. 723, 732-4.[2b] The full Commission departed from this position and held to the contrary. 295 I. C. C. 11.[3] We reversed the Commission holding[4] and we in turn were reversed upon other grounds. The Supreme Court left the question open.[5]

Without going into the question of whether our previous determination in this regard remains the law of the case we express afresh our conclusion that such approval is required. The statute unequivocally requires Commission approval for the acquisition of two or more carriers by any person. It reads:

> "It shall be lawful, with the approval and authorization of the Commission * * * for a person which is not a carrier to acquire control of two or more carriers * * * *". (§ 5[2][a]).

Its language does not suggest any exceptions and certainly none on the basis of common control by someone else having been previously authorized. It seems to us that as long as the carriers remain unmerged and unconsolidated, the Commission has full power and the duty to decide whether control of them all or any of them by the proposed new person is in the public interest. This was the un-

challenged prior consistent administrative interpretation by the Commission.[6] The full reasons for our holding were expressed in our earlier opinion at 134 F. Supp. 132, 142, and in Appendix II to our per curiam opinion at 138 F. Supp. 123, 137. We reaffirm them. We believe our view is strengthened by the emphasis in the Supreme Court's opinion upon the importance of keeping sight of the individual entities within the system (353 U. S. at p. 170).

If our conclusion in this regard is to stand, subdivision 4 of section 5 provides in emphatic terms that Alleghany's unauthorized seizure of control of the Central and its subsidiaries was unlawful and that its continued control of these carriers is unlawful as well.

Subdivision 7 of that section mandates action by the Commission to compel correction of violations of this particular subdivision, once the facts are known. It provides:

> "The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). *If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation.* The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2) and (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by another person." (Emphasis added).

Ordinarily, if the facts were less conclusive, the Commission would commence its own investigation which would proceed concurrently with the investigation concerning Alleghany's application. Here, however, there is no question of further investigation; the facts are undisputed; the Commission's findings are complete.[7] This point was inescapable because

the Commission's power to pass upon the issuance of stock by Alleghany which it exercised depended upon the fact that Alleghany controlled the New York Central system. The question is simply one of law. The Commission, after reversing Division 4, proceeded to the merits of Alleghany's various applications, on the assumption that Alleghany's control of the carriers in question was lawful. This view was erroneous.

Under these circumstances, should authorization of the issue of stock be permitted to stand? We do not see how the adequacy of the security of the new preferred could be calculated until this question is resolved or at least considered. Alleghany's investment in the Central system, as last shown in the record, was $14.7 million, over ¼ of its total portfolio.[8] As long as Alleghany's control of Central is unapproved, it is subject to injunction, divestiture and other sanctions.[9] The effect of this cloud upon the value of the stock is a matter for expert consideration rather than our speculation. In the absence of compelling reasons to the contrary, as to which no findings were made,[10] authorization of continued control should logically be determined before the stockholders act upon the proffered exchange and before the stock becomes available for sale to the public, not afterwards. To say the least, it would be arbitrary to authorize the issue without even considering the effect of divestiture upon the value of this important asset as long as that action remains a possibility. Reconsideration by the Commission for that purpose is therefore necessary. The Commissioner's duty under section 20(a) is for the protection of investors as well as persons dependent upon transportation.[11]

Neither do we see how an order for the private benefit of Alleghany may be said to be in compliance with the Act when Alleghany's status under the Act and sole basis for claiming to be entitled to this relief, or any relief under the Act, is that of a wrongdoer in unlawful control of a group of carriers. Here there is no finding of public advantage to be gained from granting Alleghany's application. Unlike the status order which made available to the Commission infor-

mation for the protection of the public or even the merger of the Bridge Company which was expected to produce operating economies of ultimate value to the public, the present order is unaccompanied by any finding of fact which would suggest a rational basis for action in advance of an investigation into the legality of Alleghany's acquisition of control. Here an investment company has been barred from issuing the stock in question by the Securities and Exchange Commission. In violation of the Interstate Commerce Act it has obtained control of a group of carriers. Solely upon the basis of this violation it now claims the advantage of less rigidly restricted financing which the Investment Company Act intended only for a person who had previously satisfied the Interstate Commerce Commission that his control of a carrier would be consistent with the public interest. The Interstate Commerce Act was never intended as a source of relief for a person in illegal control of a carrier. Such a person might be subject to all the burdens and duties imposed by the Act upon a person in legal control, but relief or benefit for such a person may not be rationally authorized under the Act, except upon finding that the public interest required such authorization notwithstanding that person's violation of the Act. In the absence of any finding that immediate action is needed in the public interest, as distinguished from the private interest of Alleghany, the stock authorization should await an appropriate application for approval of its control.

Further, reconsideration by the Commission is required because, once the error of law is recognized, the Commission's action would be in arbitrary conflict with its own settled policy, to compel prompt application for approval of acquisition of control where required under the statute, a conflict with which the Commission was not faced so long as it believed approval of acquisition of an integrated system unnecessary. It has consistently denied relief sought by those in illegal control[12] and usually compelled divestiture[13] except where it has found continuation of the control clearly in the public interest and, in most cases, that the failure to request approval was in good faith[14] due to an

oversight. Reopening of the Commission proceeding is necessary so that the Commission may give consideration to such findings here.

Finally, for even more fundamental reasons this order must be set aside. Although the Supreme Court has eliminated all doubt as to the Commission's jurisdiction—its power to decide the question here presented—it has not excused it from the need for making this decision, and making it in a logical sequence with respect to other regulatory decisions. The sequence of Commission determination may not be in arbitrary and capricious disorder; it must have a rational basis just as each order must in itself have such a basis. The approval of acquisition and continued control is an obvious first question in any application by Alleghany because unless the Commission intends to approve this control it would be regulating a company which should be properly under the control of another agency; it would be granting a wrongdoer sanctuary from the Investment Company Act; and it would be authorizing and ordering acts in aid of a known violation of the Interstate Commerce Act. The ultimate crucial result of such temporizing would be that by granting seemingly innocuous piecemeal applications, it would unobtrusively foreclose itself from any realistic determination of the fundamental question, because after the passage of time the disruption of the carriers in the system and of the public service, caused by divestiture, would be so great that it would necessarily be discarded as a practical alternative.[15]

We have been confronted with the claim that our view is inevitably inconsistent with that of the Supreme Court because otherwise it would not have left undecided the question of whether Commission approval was required with respect to a system of carriers already under common control. We see no reason why the Supreme Court, once it had faced and decided the basic question of conflicting claims of two great administrative bodies, to jurisdiction, should be presumed to have followed to the bitter end

every possible ramification of the claims of the private litigants. The holding of the Court did no more than establish the jurisdiction of the Commission and the validity of the status order.[16] The Court dealt with measures it believed necessary to protect the public from evasion of the Act by a possible wrongdoer. It did not suggest that the wrong be overlooked or that in the absence of any finding that the public interest compelled such action,[17] relief be granted for the benefit of the wrongdoer notwithstanding his wrong.

We have now recognized the Commission's jurisdiction. This unquestionably includes the power to authorize the issue of preferred stock in question but we hold that although there might be circumstances when such action could reasonably be taken before approving the acquisition of control over the Central system, there were no findings of facts which justify such action in the present case.

Accordingly, judgment must be granted in favor of plaintiffs. A judgment will be entered setting aside the order of the Commission authorizing the issue of the preferred stock and enjoining acts of the defendants in furtherance thereof. Defendants may apply for a thirty day stay of enforcement to enable them to perfect an appeal to the Supreme Court. The preliminary injunction in its present form shall continue until further order of the Court.

Settle order on notice.

CHARLES E. CLARK.
U. S. C. J.

E. J. DIMOCK
U. S. D. J.

LAWRENCE E. WALSH
U. S. D. J.

Dated: September 27, 1957.

FOOTNOTES

[1] Briefly the history of this proceeding is as follows:

Mar. 2, 1955—Division 4 of I. C. C. ordered that Alleghany be considered as a carrier subject to its regulation. 290 I. C. C. 725.

Apr. 6, 1955—Plaintiffs, in a related action, *Breswick* v. *Briggs*, sought injunction of present stock issue. The application was denied to permit I. C. C. to give prior consideration to plaintiffs' claim. 130 F. Supp. 953.

May 24, 1955—Full Commission affirmed Division 4's holding as to status. 295 I. C. C. 11.

May 26, 1955—Division 4 approved present stock issue.

June 6, 1955—Present action commenced by plaintiffs. No application was made for temporary injunction pending final disposition by I. C. C.

June 22, 1955—Full Commission denied reconsideration of order authorizing stock issue. Notwithstanding plaintiffs' application for a stay the order was made effective immediately.

June 23, 1955—This order was made public but notice thereof was not given plaintiffs. Alleghany immediately commenced issuance of the stock pursuant to the authorization of the Commission.

June 23, 1955—Plaintiffs, having learned of the Commission order after two-thirds of the stock had been issued, obtained a restraining order staying transactions with respect to the stock pending disposition of this proceeding.

July 21, 1955—A preliminary injunction was granted by this Court (Hincks, C. J. dissenting). 134 F. Supp. 132.

Aug. 3, 1955—The preliminary injunction was stayed by Mr. Justice Harlan as to that part of the stock issued before this Court's restraining order was granted. 75 S. Ct. 912.

Nov. 18, 1955—Enforcement of the I. C. C. order and issuance of the stock was permanently enjoined.

it being held that the Commission was without jurisdiction over Alleghany. 138 F. Supp. 123. Frank, C. J. had replaced Judge Hincks as a member of this Court. This Court stayed the injunction pending appeal. The preliminary injunction, as modified by Mr. Justice Harlan, was continued.

Apr. 22, 1957—Supreme Court reversed our holding but declined to vacate the preliminary injunction, remanding the case for consideration of claims not previously considered as to the failure of the Commission's order to comply with the Interstate Commerce Act. 353 U. S. 151.

June 14, 1957—An application to this Court to vacate the preliminary injunction was denied. Chief Judge Clark had replaced the late Judge Frank as a member of this Court.

[1a] The scope of the remand was stated as follows, 353 U. S. at p. 175:

> "For all these reasons, the judgment of the District Court must be reversed and the case remanded for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act. • • • •"

[2] The Supreme Court held that jurisdiction could be based upon its unapproved acquisition of control as well as approved. (353 U. S. at pp. 161-2). It said:

> "The District Court held that whatever control Alleghany had over Central did not fit within the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' because the Commission had not given the approval necessary for acquisition of control of Central and its subsidiaries, 'two or more carriers.'
>
> "The Commission and Alleghany contend that Commission approval of the acquisition of a single, integrated system is not necessary. We need not decide this question, however, and intimate no opinion on it, for even if such approval is necessary, the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' refers to 'control' and not to 'approved control.' There seems to be no reason to read in the word 'approved'. Such a holding would mean that the failure of a company engaging

in a transaction requiring Commission approval to apply for that approval would deprive the Commission of jurisdiction. Remedies against a violator are provided by § 5(7), (8), and (9) of the Act. To punish a violator by depriving the Commission of jurisdiction over it would be indeed quixotic. As the Commission points out, the problem would appear clearer were Alleghany contesting, rather than acquiescing in, its jurisdiction."

[2a] Inasmuch as the full Commission believed its approval unnecessary this was a matter considered only by Division 4. See *Louisville & J, B. & R. Co., Merger,* 290 I. C. C. 725, 733, 741, 746. These findings are also printed in the Record on Appeal to the Supreme Court, *Alleghany Corp.* v. *Breswick & Co.*, (353 U. S. 151). See pp. 425, 435, 441-2. The finding of consistency with the public interest, insofar as it related to control was restricted to the properties and franchises of the Louisville & Jeffersonville Bridge and Railroad Company, 290 I. C. C. 725, 747; Record, op. cit., p. 443.

[2b] Record, op. cit., pp. 425-7.

[3] Its opinion has not yet been bound. It may be found in the Record on Appeal to the Supreme Court, Record, op. cit., pp. 506-515. The brief discussion of the subject occurs at p. 512.

[4] 134 F. Supp. 132, 143-44; 138 F. Supp. 123, 137-38.

[5] 353 U. S. at p. 161.

[6] In *Louisville & J. B. & R. Co. Merger,* 290 I. C. C. 725, 733, Division 4 said:

"The Central system includes many individual carriers which are controlled by Central through stock ownership or otherwise. We long have recognized under section 5, that railroad systems are comprised of 2 or more carriers, and that control of a single system may not lawfully be effectuated without our approval and authorization. [Citing *Seaboard Air Line Ry. Co: Receivership,* 261 I. C. C. 689, 717. *New York S. & W. R. Co. Reorganization,* 282 I. C. C. 801 (not printed in full). *Arkansas & L. M. Ry Co. Control,* 282 I. C. C. 254, 260. *Weinstein-Control-Capital Transit Co. and Montgomery,* 56 M. C. C. 127, 131. *Stoughton-Control-Delaware Coach Co.,* 57 M. C. C. 456. *Kittrell-Control-Dixie Motor Coach Corp.,* 37 M. C. C. 91.] That principle is considered basic, almost as a definition. So much so, that the question of acquisition of a carrier system has never been contested before the Commission, and as far as we know, there have been no court decisions touching on that issue. Nevertheless, because of the stress which Alleghany places on this point, some discussion thereof is necessary."

[6a] In earlier stages of the litigation defendants have expressed fear that injecting the Commission into proxy contests would unduly interfere with stockholder suffrage. As we pointed out in an earlier opinion, 134 F. Supp. 132, 144, although this concern might have relevance where control was acquired other than by the acquisition of a controlling block of corporate stock by a single person, or a small concerted group of persons, there were no findings that such was the case here. On the contrary, a significant part of the Commission's regulation of Alleghany has concerned the acquisition of such a block of Central's stock and coordinated activities of Alleghany's officers as individual stockholders of Central. See *Chesapeake & O. Ry. Co.-Purchase*, 271 I. C. C. 513 (1948).

[7] The findings are to be found in *Louisville & J. B. & R. Co. Merger, supra.*, 290 I. C. C. 725, at pp. 733, 741, Record, op. cit., pp. 425, 435. (Division 4) and 295 I. C. C. 11, , Record, op. cit., pp. 511-12, 513 (full Commission).

[8] The schedule of Alleghany's investments as of December 31, 1954 was as follows (Record, op. cit., p. 166):

	Cost	*Indicated Market Quotations*
New York Central Securities ..	$ 6,918,118	$ 9,607,800
Alleghany share of joint ventures in Central investments (See Note (3) Record p. 169)	7,500,000	10,050,000
	$14,418,118	$19,657,800
Total investments	$33,342,393	$67,944,633

[9] As to carriers, the usefulness of these assets may also be subjected to other restrictions. See *Bonds of St. Louis-S. F. Ry. Co.*, 150 I. C. C. 139 (1928), in which an unapproved acquisition by a carrier was held to be not capitalizable. The extent to which analogous restrictions might apply to the financing of a person not a carrier is a matter for consideration by the Commission.

[10] The only findings of possible significance in this regard are that the plan was a further step in a program initiated eight years earlier, in September, 1946; that it will eliminate dividend arrearages and give the preferred stockholders an opportunity to participate in the "progress of the applicant". Record, op. cit., pp. 528-530. Contrast the findings by Division 4 as to why Alleghany should be required to report as a carrier notwithstanding the illegality of the manner by which it obtained its status. *Louisville & J. B. & R. Co. Merger, supra.*, 290 I. C. C. 725, at p. 741.

While the dominant purpose of § 20(a) was to ensure sound railroad financing in the interest of the proper development of our transportation system, an important related aim was "to protect the investing public against the dissipation of railroad resources through faulty or dishonest financing". (Sharfman, The Interstate Commerce Commission, Vol. I, pp. 189, 190).

Throughout the history of this legislation, there was universal recognition of the interrelation of sound railroad financing and the protection of investors, the latter being essential to maintaining confidence in railroad investment. 58 Cong. Rec. 9160, 9163 (66th Cong., 1st Sess.); Sharfman, The Interstate Commerce Commission, pp. 190-191 (1931).

> "• • • If the people who have money will not invest it in the transportation enterprise, private ownership and operation under public control must necessarily fail. It is apparent, therefore, that any legislation which may be proposed upon the hypothesis of private ownership and operation must tender to the future investor reasonable security for the investment he is asked to make and reasonable assurance of such yearly return upon his money as will induce him to enter the field." Senate Report No. 304, 66th Cong., 1st Sess. (1919).

See also testimony of Commissioner Clark, Hearings before the Senate Committee on Interstate Commerce on Extension of Tenure of Government Control of Railroads, Vol. I, p. 343 (1919); The New England Investigation, 27 I. C. C. 560, 616 (1913); Matter of Consolidations & Combinations of Carriers, 12 I. C. C. 277, 306 (1907); see also 21st Annual Report of Interstate Commerce Commission, p. 24 (1907).

In 1913 and 1916, the House of Representatives passed legislation which substantially incorporated the provisions of the present § 20(a). The House Reports on these bills indicate recognition of the fact that one of the aims of the statute was to protect investors from the abuses of speculative financing. H. R. Report No. 681, pp. 3, 4 (63rd Cong., 2d Sess., 1914); H. R. Report No. 349, pp. 8, 9 (64th Cong., 1st Sess., 1916). This was made explicit by a question addressed to Mr. Rayburn, a member of the House Committee on Interstate and Foreign Commerce, during debate on the 1913 bill:

> "Mr. McKenzie: Is it not one of the main purposes of this bill to give stability and value to railroad stocks and bonds for the protection of the men and women who invest their money in these stocks and bonds in good faith, so that the rate to be charged by the railroads is not the only material fact in the bill?

> Mr. Rayburn: It [the rate charged] is not; but the gentleman's question answers itself and answers it much better than I can, and I thank him for it." 51 Cong., Rec. 9687 (63rd Cong., 2d Sess., 1914).

By exempting carrier securities from any states or Securities and Exchange Commission regulation, Congress has given further evidence that it looks to the I. C. C. to protect the welfare of investors in considering stock issues under § 20(a). It is impossible to believe that Congress could have intended investors in carrier securities to be left without any of the protections afforded other investors. When Congress exempted corporations like Alleghany from compliance with the provisions of the Investment Company Act, it manifested no intent to deprive stockholders in such companies of the safeguards provided for other investment companies, but merely an intent to avoid dual regulation.

In this regard we modify the view we expressed in our earlier opinion, 134 F. Supp. 132, 140, footnote 9, in which we said:

> "The I. C. C. control with respect to the issuance of securities is merely to protect against over-issue, not to hold the balance between management and investor."

This was an overstatement; its emphasis upon the Commission's primary responsibility neglected the secondary duty to protect public investors.

[12] It is the practice of the Commission when an application discloses an underlying violation of section 5 to commence its own investigation into the violation which is conducted concurrently with the investigation of the application. In the absence of exceptional circumstances the application will be denied and divestiture ordered. Cases in which applications for merger were denied because of prior unauthorized control are: *Gisinger-Investigation of Control*, 60 M. C. C. 321, 327 (1954); *Transcontinental Bus System, Inc.-Inv. of Control* (Arkansas Motor Coaches), 57 M. C. C. 323 (1951); *Pacific Greyhound Lines-Control and Merger*, 56 M. C. C. 415, 434, 440 (1950); *Hodge-Control*, 40 M. C. C. 499 (1946). In *Gisinger-Investigation of Control, supra.*, 60 M. C. C. 321, 327, 329 (1954) it was said:

> "The application in this proceeding is in effect a request for validation of the existing unlawful control. The merger of the properties is merely a second step to change the form of the control already unlawfully in effect. The act contemplates that consideration be given to 'proposed' transactions under section 5. Although it has been stated that such violations of section 5 are not an absolute bar to approval, each case must be considered on its merits • • • ". (327)

• • •

"• • • In effect, applicants would have us ignore the unlawful control which has now continued for some years, and authorize the merger on the basis of the evidence presented, which is largely based on the unlawful control and the operations thereunder and directed primarily to the merger. The real issue is whether the common control of these carriers should be sanctioned under the circumstances presented. In our opinion, this record shows such a flagrant disregard for the law that divestiture should be ordered". (329).

Cases in which the Commission has refused to approve purchases of stock for this reason are: *Kolowich-Control*, 58 M. C. C. 599, 609 (1952); *Welch-Control*, 56 M. C. C. 505 (1950); *Mooney-Control*, 56 M. C. C. 771 (1950); *Pacific Greyhound Lines-Control and Merger, supra.*, 56 M. C. C. 415, 434 (1950); *Casser-Investigation of Control*, 57 M. C. C. 53, 67 (1950) and 55 M. C. C. 696 (1949); *Hodge-Control, supra.*, 40 M. C. C. 499 (1946); *Manlowe-Control*, 45 M. C. C. 125 (1946). Cases denying applications to transfer operating rights for this reason are: *Interstate Motor Freight System-Purchase*, 65 M. C. C. 37, 53 (1955); *Myrick-Purchase*, 57 M. C. C. 1 (1950); *Jones-Purchase*, 57 M. C. C. 105 (1950); *Texas, New Mexico & Oklahoma Coaches, Inc.-Purchase*, 55 M. C. C. 269 (1948); *Congdon-Purchase*, 50 M. C. C. 781 (1948); *McRae-Purchase*, 45 M. C. C. 636 (1947); *Mitchell-Purchase*, 40 M. C. C. 283 (1945); *Tornetta-Purchase*, 40 M. C. C. 339, 343 (1945).

Similarly, it has refused to approve an issue of securities for the purpose of financing an unapproved acquisition. *Bonds of Chesapeake & O. Ry. Co.*, 150 I. C. C. 257, 259-60 (1929).

[13] Denial of applications is usually accompanied by compelled divestiture, although sometimes left to be accomplished voluntarily or by subsequent proceeding. Divestiture was ordered in *Gisinger-Investigation of Control; Transcontinental Bus System, Inc.-Inv. of Control; Pacific Greyhound Lines-Control and Merger; Myrick-Purchase; Kolowich-Control; Mooney-Control; Casser-Investigation of Control; McRae-Purchase; Manlowe-Control*; op. cit.

[14] In *Casser-Control-Bingler Vacation Tours, Inc.*, 57 M. C. C. 53, 67, the Commission said:

"• • • and we have given our approval to concluded transactions under that section [§ 5] only in comparatively rare instances where the parties had acted in entire good faith, appropriate applications were filed promptly upon apprisal of the unlawfulness, and the transaction clearly was consistent with the public interest".

The fact that the applicant was in good faith unaware of the illegality, is a significant consideration. *Coast Lines Truck Service*,

Inc.-Control and Merger, 58 M. C. C. 115, 131 (1951); *Consolidated Truck Lines-Control and Merger*, 57 M. C. C. 277, 281 (1951); *Sims-Purchase*, 40 M. C. C. 228, 230 (1945). In some cases applications have also been granted because there is a strong public interest in continuance of service which might be disrupted if divestiture were ordered; in other words, the violation is tolerated in the interest of the public, not out of consideration for the violator. *Baggett-Control*, 65 M. C. C. 522, 525 (1955); *Potomac Coach Lines, Inc.-Purchase*, 57 M. C. C. 199, 207 (1950); *Capitani-Control*, 57 M. C. C. 413, 420 (1951); *Bowman-Control*, 55 M. C. C. 802 (1949); *Commercial Petroleum and Transport-Control*, 58 M. C. C. 439, 459 (1952); *L[illegible]-Control*, 50 M. C. C. 163, 168 (1947). Cf. *Cochrane-Purchase*, 40 M. C. C. 233, 237 (dissenting opinion) (1945).

[15] Although the Commission consistently points out that an illegal acquisition does not become protected by the passage of time or the prior knowledge of the Commission or its grant of other applications, (see *Transcontinental Bus System, Inc.-Inv. of Control, supra.*, 57 M. C. C. 323, 334), there is no doubt that the disruption of the public service by delayed divestiture will weigh against the exercise of this sanction. See *Commercial Petroleum & Transport Co.-Control, supra.*, 58 M. C. C. 439, 459.

[16] The plaintiffs were held not to be interested parties for the purposes of being heard before the entry of the merger and status orders. 353 U. S. 151, 173-175.

[17] Cf. Division 4 findings, *Louisville & J. B. & R. Co. Merger, supra.*, 290 I. C. C. 725, 741; Record, op. cit., p. 435.

Final Judgment

[Same Title]

This action to enjoin and set aside certain orders of the Interstate Commerce Commission authorizing Alleghany Corporation to issue certain stock and to enjoin Alleghany Corporation, having come on for final hearing, on remand from the Supreme Court of the United States, on September 5, 1957, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325 of Title 28 of the United Code, consisting of the undersigned judges; and the court having considered the pleadings, evidence and the briefs and having heard the arguments of counsel for the respective parties, and being fully advised in the premises; and on September 27, 1957 having filed its opinion herein containing its findings of fact and conclusions of law; now, in accordance with said opinion, findings and conclusions, it is

Ordered, Adjudged and Decreed that the orders of the Interstate Commerce Commission, dated May 26, 1955 and June 22, 1955, entered in Finance Docket No. 18866, authorizing Alleghany Corporation to issue (a) not exceeding 1,367,440 shares of 6% convertible preferred stock, par value $10 a share, to be offered to the holders of its cumulative 5½% preferred stock, Series A, par value $100 a share, in exchange, on the basis of 10 shares of 6% convertible preferred stock for each share of cumulative 5½% preferred stock, Series A, and (b) not exceeding 14,768,352 shares of common stock, par value $1 a share, upon conversion of such 6% convertible preferred stock on the basis set forth in the application of Alleghany Corporation and the report of the Interstate Commerce Commission, be and they hereby are enjoined, set aside, annulled and suspended; and it is

Further Ordered, Adjudged and Decreed that Alleghany Corporation, its transfer agents, officers, directors,

servants and employees, be and are hereby enjoined from taking any steps in connection with or in furtherance of the issuance of said 6% convertible preferred stock in exchange for said 5½% preferred stock, or for any other purpose, or the transfer thereof, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the enforcement of this judgment and the injunctions issued herein, subject to the exception stated in the next paragraph, is hereby suspended for a period of 30 days from the date hereof to permit any defendant or defendants in this action to file notice of appeal to the Supreme Court of the United States from this judgment and the injunctions contained herein, and upon the filing of said notice of appeal by any defendant in this action, the enforcement of this judgment and the injunctions contained herein shall be further suspended until the issuance of the order of this court upon the mandate from the Supreme Court of the United States, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the stay pending appeal provided by the foregoing paragraph, except to the extent provided in the next paragraph, shall not apply to so much of said judgment and injunctions as is directed to Alleghany Corporation, its transfer agents, officers, directors, servants or employees, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that, despite the provisions of the last preceding paragraph, the stay provided by the paragraph last but one shall apply to said judgment and injunctions to the extent that they enjoin Alleghany Corporation, and its transfer agents, officers, directors, servants or employees from transferring the 900,000 shares of 6% convertible preferred stock delivered prior to the stay granted by Mr. Justice Harlan on August 3, 1955 in connection with the previous appeal herein.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to apply to the court at any time upon the expiration of the stay provided herein for such further orders and directions as may

be necessary or appropriate for the construction or carrying out of this Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

Dated: New York, N. Y.
October 17, 1957.

CHARLES E. CLARK
U. S. C. J.

E. J. DIMOCK
U. S. D. J.

LAWRENCE E. WALSH
U. S. D. J.

APPENDIX B

Sections 5(2), (3), (4), (7), (8), (9), (11) and 20a of the Interstate Commerce Act (49 U. S. C. §§ 5(2), (3), (4), (7), (9), (11) and 20a), as they appear in Title 49 of the United States Code, provide in pertinent part as follows:

§ 5. *Combinations and consolidations of carriers.*— • • •

(2) *Unifications, mergers, and acquisitions of control.*

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this section—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a) of this section, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated,

and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable:

Provided, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

* * *

(3) *Noncarrier deemed carrier upon acquiring control.*

Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2) of this section, to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Sections 20(1)-(10), 304 (a) (1) and (2), 320 and 913 of this title, (which relate to reports, accounts, and so forth,

of carriers), and sections 20a(2)-(11), and 314 of this title, (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of sections 20a and 314 of this title, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

(4) *Control effected by other than prescribed methods.*

It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subparagraph (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words "control or management" shall be construed to include the power to exercise control or management.

* * *

(7) *Investigation by Commission of effectuation of control by nonprescribed methods.*

The Commission is authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4) of this section. If the Commission finds after such investigation that such person is

violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2)-(12) of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person.

(8) *Jurisdiction of injunctions, etc., against violations of section or orders.*

The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

(9) *Supplemental orders by Commission.*

The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7) of this section, as it may deem necessary or appropriate.

* * * *

(11) *Plenary nature of authority under section.*

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or

at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

* * *

§ 20a. *Securities of carriers; issuance, etc.*—(1) *Carrier defined.*

As used in this section, the term "carrier" means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this chapter, or any corporation organized for the purpose of engaging in transportation by railroad subject to this chapter, or a sleeping-car company which is subject to this chapter.

(2) *Issuance of securities; assumption of obligations; authorization.*

It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities")

or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption:

(a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

(3) *Scope of Commission's authority.*

The commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of the paragraph (2) of this section.

(4) *Form and contents of application; oath and signature.*

Every application for authority shall be made in such form and contain such matters as the commission may prescribe. Every such application, as also

every certificate of notification hereinafter provided for, shall be made under oath, signed and filed on behalf of the carrier by its president, a vice president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the carrier.

(5) *Disposition of securities described in application, etc.*

Whenever any securities set forth and described in any application for authority or certificate of notification as pledged or held unencumbered in the treasury of the carrier shall, subsequent to the filing of such application or certificate, be sold, pledged, repledged, or otherwise disposed of by the carrier, such carrier shall, within ten days after such sale, pledge, repledge, or other disposition, file with the commission a certificate of notification to that effect, setting forth therein all such facts as may be required by the commission.

(6) *Notice of application to governors of States; intervention; hearings.*

Upon receipt of any such application for authority the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service, or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceedings. The commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority.

(7) *Jurisdiction of Commission as exclusive and plenary.*

The jurisdiction conferred upon the commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.

(8) *Guaranty of securities.*

Nothing herein shall be construed to imply any guaranty or obligation as to such securities on the part of the United States.

(9) *Issue of short-term notes; certificate of notification; proviso.*

The foregoing provisions of this section shall not apply to notes to be issued by the carrier maturing not more than two years after the date thereof and aggregating (together with all other then outstanding notes of a maturity of two years or less) not more than 5 per centum of the par value of the securities of the carrier then outstanding. In the case of securities having no par value, the par value for the purposes of this paragraph shall be the fair market value as of the date of issue. Within ten days after the making of such notes the carrier issuing the same shall file with the commission a certificate of notification, in such form as may from time to time be determined and prescribed by the commission, setting forth as nearly as may be the same matters as those required in respect of applications for authority to issue other securities: *Provided*, That in any subsequent funding of such notes the provisions of this section respecting other securities shall apply.

(10) *Reports by carriers as to securities or proceeds.*

The commission shall require periodical or special reports from each carrier issuing any securities, including such notes, which shall show, in such detail as the commission may require, the disposition made of such securities and the application of the proceeds thereof.

(11) *Securities issued contrary to law void; effect; penalty.*

Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any

term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. If any security so made void or any security in respect to which the assumption of obligation or liability is so made void, is acquired by any person for value and in good faith and without notice that the issue or assumption is void, such person may in a suit or action in any court of competent jurisdiction hold jointly and severally liable for the full amount of the damage sustained by him in respect thereof, the carrier which issued the security so made void, or assumed the obligation or liability so made void, and its directors, officers, attorneys, and other agents, who participated in any way in the authorizing, issuing, hypothecating, or selling of the security so made void or in the authorizing of the assumption of the obligation or liability so made void. In case any security so made void was directly acquired from the carrier issuing it the holder may at his option rescind the transaction and upon the surrender of the security recover the consideration given therefor. Any director, officer, attorney, or agent of the carrier who knowingly assents to or concurs in any issue of securities or assumptions of obligation or liability forbidden by this section, or any sale or other disposition of securities contrary to the provisions of the commission's order or orders in the premises, or any application not authorized by the commission of the funds derived by the carrier through such sale or other disposition of such securities, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $1,000 nor more than $10,000, or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court.

LIBRARY
SUPREME COURT, U.S.

No. 617

Office - Supreme Court, U.S.
FILED
DEC 23 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER, and ALVIN J. DELAIRE, a copartnership doing business as Gruss & Co.,

Appellants,

v.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY TO MOTION TO AFFIRM

HAROLD H. LEVIN,
300 Park Avenue,
New York 22, New York,
Attorney for Appellants,
JOSEPH S. GRUSS, *et al.*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 617

JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER, and ALVIN J. DELAIRE, a copartnership doing business as Gruss & Co.,

Appellants,

v.

BRESWICK & Co., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated;

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY TO MOTION TO AFFIRM

I.

On remand the District Court erroneously reinstated its determination, reversed by this Court on the first appeal, that the preferred stock order should be set aside for failure to approve Alleghany's control of Central.

Ignoring or misconceiving the exhaustive proceedings culminating in this Court's decision of the earlier appeal, the appellees persistently distort that decision by describing it as a mere "affirmance of the ICC [status, not preferred stock] order dated May 24, 1955, assuming jurisdic-

tion over Alleghany pursuant to § 5(3)" (Motion to Affirm, pp. 2, 24, 25, 26). The obvious, but important, correction is that this Court in fact announced no such partial and artificial "affirmance" of the ICC, but reversed the District Court's judgment. That judgment had set aside both the status and the preferred stock orders upon the clearly stated ground, *inter alia*, that ICC had not approved Alleghany's acquisition of control over Central. 138 F. Supp. at 128, 131-2, 136.

The difference is crucial. The correction refutes the effort to show that the District Court remained free to reinstate its earlier, and reversed, theory that the ICC's stock orders were void because Alleghany's acquisition of control over Central had not been approved.

As these and the other appellants have stressed in their statements as to jurisdiction, this Court held on the first appeal that it was unnecesary to decide whether the ICC was required to approve Alleghany's acquisition of control over Central. 353 U. S. at 151-152. That express ruling, we have urged, unmistakably removed that issue from the case, excluding it from the "claim, not previously discussed" (*id.*, at 175), the only thing left open on the remand. Because this point is decisive, and because we think the account of the earlier proceedings in the Motion to Affirm is both plainly erroneous and potentially confusing, we undertake briefly to erase the doubts appellees suggest.*

---

* Possibly confusing, too, is appellees' suggestion (Motion to Affirm, p. 7) that the decision below on remand "left the door open to a regularization by Alleghany of its position if it would merely file an application under § 5(2)" for approval of its control over Central. If this implies a possibility of quickly terminating this matter by the suggested application, it is misleading. As shown by the quotation from the District Court's opinion in footnote 7, p. 5, of the Motion to Affirm, the lower court would require not only a § 5(2) application but also a resubmission of the exchange plan to the stockholders. In other words, the decision below would set at naught the protracted and costly proceedings up to this point. At every step, moreover, it would invite a repetition of review proceedings by the appellees resulting in still further extended delays.

1. There is, of course, no doubt that the ICC's stock order as well as the jurisdiction-assuming order were before the District Court and this Court on the prior appeal. Indeed, both courts agreed that it was only the stock order which gave the appellees standing in this litigation. See 138 F. Supp. at 131-132; 353 U. S. at 160, 174, 175.

2. The District Court had set aside both the stock and status orders. 138 F. Supp. at 132-133. It had, with perfect clarity, stated alternative holdings based on its conclusion that Alleghany's control over Central required ICC approval. Anticipating the possibility that this Court might disagree with its holding on jurisdiction, and undertaking to avoid piecemeal disposition of the case, the District Court had held both

> (a) that the absence of such approval was a fatal defect in ICC's jurisdiction (*id.*, at 128, 132, 136); and
>
> (b) alternatively, and critically for present purposes, that, if it was wrong on the jurisdictional point, its nullification of both ICC orders should stand pending the agency's determination whether Alleghany's control over Central was in the public interest (*id.*, at 136).

3. When this Court reversed, it rejected both alternative holdings of the District Court. This Court held it unnecessary to resolve the control question in this case and limited the function of the District Court on remand to determining the questions on which appellants have now prevailed below. Both of the District Court's earlier alternative holdings fell with that decision.

To hold that the second ground remained eligible for revival is to hold that this Court, after squarely addressing itself to the point, invited this inevitable second appearance. Apparently recognizing the absurdity of such a conclusion, the appellees seek vainly to escape it with their description of this Court's action as an "affirmance" of the ICC's status order—with the stock order relegated to "another

proceeding''—rather than a reversal of the District Court's nullification of both orders.

4. As if to emphasize the character of this repeat performance, the appellees open their argument with what is largely a shortened but still substantial duplicate of their contention on the first appeal that Alleghany's control over Central required ICC approval. Compare the present Motion to Affirm, pp. 8-16, with the Brief for Appellees in No. 36, Oct. T. 1956, pp. 61-83. In their brief on the first appeal (p. 83), correctly describing and seeking to sustain the District Court's action, the appellees claimed that the absence of such ICC approval ''justified the District Court's annulment of the status *and preferred stock orders*'' (emphasis added). That argument was rejected *in toto* as irrelevant. To hold summarily now that the District Court erred in declaring it relevant again is not ''to deprive appellees of their day in this Court and in the lower Court on this claim'' (Motion to Affirm, p. 26). It is only to shorten finally this repetitive second ''day'' in a litigation which imposes a mounting and undenied burden upon the preferred stockholders.*

---

* In addition to the points summarized above, there is an independently sufficient answer to the District Court's decision in section 20a(11) of the Interstate Commerce Act, which provides that ''no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor [by the ICC under this section] * * * shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization.'' The plain purpose of this provision, part of the immanent scheme of administrative finality throughout 20a, was to make an ICC authorization a definitive basis upon which investors could rely. In a lame effort to escape this conclusion, the appellees suggest (Motion to Affirm, p. A 6) that the reference is ''to a 'failure' by the issuer and not to a failure by the ICC to make a valid order.'' But it would be absurd to conclude that Congress intended to protect issuers against *their own defaults* while leaving them (and the whole financial community) exposed to a voiding of their securities on account of some omission by the ICC.

II.

The asserted "shortage" of Alleghany assets presents only a frivolous quarrel with the ICC on a matter confided to that agency's expert judgment.

While appellees correctly state that the District Court "did not discuss" this remaining contention (Motion to Affirm, p. 30), it was presented to that Court in language substantially the same as that of Point III of the present Motion to Affirm. It is fairly to be included, we submit with the lengthy, trivial, frequently inconsistent business and economic theories which the appellees advanced and the District Court properly dismissed on the ground (Appendix A to our Statement as to Jurisdiction, p. 24)—

> "that the facts disclosed to the Commission and available as matters of public knowledge were enough to put an expert body on notice of all the alleged undesirable qualities of the issue; that the questions so raised were within the range of expert judgment reserved to the Commission; that its findings thereon satisfy the statute; and that we may not substitute our views for those it expressed."

That conclusion is fully applicable to, and dispositive of, the appellees' proposed alternative ground for affirmance, which does not merit the time of this Court for further briefs and argument.

On its merits, the appellees' claim of an asset "shortage"—based upon a comparison of market value of Alleghany's assets with market value of Alleghany's securities at the time of the ICC orders—is pointless. As shown by the very ICC decisions appellees cite, the only relevant comparison in determining whether there is over-capitalization would be between assets and *par value or stated value* (not market value) of the outstanding securities. *Chesa-*

peake & Ohio R. Co. Stock, 254 ICC 653; *Commercial Motor Freight Inc.*, 10 Fed. Carrier Cases. ¶33,089.*

The flimsiness of appellees' different view is highlighted by the sharp inconsistencies in their position:

> (1) They contended at length in the District Court that the conversion ratio was wrong because it was based upon a price of 8¾ for Alleghany common stock, the market price on the date which the ICC set to fix the ratio. The figure should have been higher than 8¾, they argued, to make the conversion rights of the new preferred less valuable. Appellees make no effort to square this rejection of market price where it was plainly appropriate with their insistence on referring to this price where it has no legitimate bearing. Nor do they mention that the low price of the common today leaves the holders of the new preferred, whose investment has been frozen by this litigation for over two years, with conversion rights of which the value now approaches zero.
>
> (2) Instead, appellees merely charge that the ICC was wrong because the market prices of Alleghany and Central securities, like others in general and railroad prices in particular, have declined sharply in recent months.** But this only illustrates the

---

* Thus, in the *Chesapeake & Ohio* case, while it concluded that the proposed issue there in question should not be authorized (254 ICC at 659), the ICC made its computations on the basis of the $25 *par value* of the applicant's common stock although the market price of this stock was almost double this amount (47⅞) at the time (*id.* at 654, 658). See, similarly, *Commercial Motor Freight, supra*, 10 Fed. Carrier Cases at p. 431, where a proposed issue was approved because it left capitalizable assets of a value "in excess of the par amount of the proposed issue of stock."

** In other words, having chided the ICC in the earlier stages of this litigation for failing to predict that the market would rise, the appellees blandly complain now that the agency did not foresee the recent fall.

plain fact that market comparisons like the ones appellees suggest are shifting and unreliable bases for judgment. Not a syllable in Section 20a requires the ICC to employ such criteria. Rather, the sweeping authority granted by this provision makes appropriate here this Court's conclusion as to a more restricted area of administrative (SEC) authority—that "[t]he informed judgment of the Commission rather than that of the market, has been designated by the Act as the appropriate guide * * *." *Niagara Hudson Corp.* v. *Leventritt*, 340 U. S. 336, 346-347; and see *In re New England Public Service Co.*, 94 F. Supp. 343, 348 (D. Me.).

Even if appellees' "shortage" theory were a more arguable one as a matter of financial judgment, it would supply no basis for further consideration—and certainly none for affirmance—by this Court. As under Section 5 of the Interstate Commerce Act, the "exclusive and plenary" authority of the ICC under Section 20a* includes an extremely broad range of judgment and discretion. On familiar principles, the Commission's rejection of appellees' theory was well within that range. Cf. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 87-88; *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 536; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145-146.

Conclusion

For the reasons outlined above and in the statements as to jurisdiction, it is respectfully submitted that there is no ground for affirmance and ample basis for summary reversal of the decision below, so that the paralysis this

---

* The quoted words are from § 20a(7); cf. § 5(11); and see § 20a(11), p. 4, fn., *supra*.

case has effected for over two years may finally end and the preferred shareholders be freed to employ and protect their investments.

Respectfully submitted,

HAROLD H. LEVIN,
300 Park Avenue,
New York 22, New York,
Attorney for Appellants,
JOSEPH S. GRUSS, *et al.*

December, 1957.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT	3
THE QUESTIONS ARE SUBSTANTIAL	9
RELIEF REQUESTED	23
APPENDIX A—District Court opinion	25
APPENDIX B—Judgment	48
APPENDIX C—Report and order of the Interstate Commerce Commission	52
APPENDIX D—Statutes involved	79

CASES CITED

Alleghany Corporation Notes, F. D. No. 19422	15
Chesapeake & Ohio R. Co., Purchase, 261 I. C. C. 239	19
F. C. C. v. *Pottsville Broadcasting Co.*, 309 U. S. 134	16
F. C. C. v. *WJR*, 337 U. S. 265	16
F. P. C. v. *Colorado Interstate Gas Co.*, 348 U. S. 492	17
Franklin v. *Jonco Aircraft Corporation*, 346 U. S. 868, 346 U. S. 917	23
Louisville & Jeffersonville Bridge & R. R. Company Merger et al, 295 I. C. C 11	9
McLean Trucking Co. v. *United States*, 321 U. S. 67	22
New York Central Securities Corp. v. *United States*, 287 U. S. 12	20
United States v. *Capital Transit Co.*, 338 U. S. 286	17
United States v. *Tucker Truck Lines*, 344 U. S. 33	17
White v. *Howard*, 347 U. S. 910	23

STATUTES CITED

Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1 et seq.:	
Section 5	24
Section 5 (2)	3, 9, 10, 15
Section 5 (3)	4, 13, 14, 16, 18, 21
Section 5 (7)	16, 17
Section 20a	2, 3, 4, 24
Section 20a (2) to (11)	3, 4, 5, 8, 9, 12, 13, 14, 15, 16, 17, 19, 20, 21
Investment Company Act of 1940, 54 Stat. 789, 15 U. S. C. 80a:	
Section 3 (c) (9)	13, 22
28 U. S. C. 1253, 2101 (b)	2

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. ——

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

BRESWICK & CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York is not yet reported but is set forth in Appendix A to this statement. The judgment of the District Court is set forth in Appendix B. The report and order of the Interstate Commerce Commission in Finance Docket No. 18866, *Alleghany Corporation Stock*, appears at pages 518–537 of the printed record[1] in *Alleghany Corporation et al. v. Breswick & Co. et al.*, 353 U. S. 151, and is also set forth in Appendix C.

---

[1] (R. —) references are to the printed record in the prior proceedings in this Court.

JURISDICTION

The judgment of the District Court was entered on October 17, 1957. Notice of appeal was filed in that court by the Interstate Commerce Commission on November 13, 1957.

The jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b), and is sustained by this Court's decision in the prior appeal in this action. *Alleghany Corporation et al.* v. *Breswick & Co. et al.*, 353 U. S. 151.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in Appendix D.

QUESTIONS PRESENTED

The District Court set aside an order of the Interstate Commerce Commission authorizing Alleghany Corporation to issue not exceeding 1,367,440 shares of 6% convertible preferred stock in exchange for outstanding shares of its cumulative 5½% preferred stock, and to issue not exceeding 14,768,352 shares of common stock upon the conversion of the convertible preferred stock. The sole ground for the decision was that the Commission lacked power to act upon Alleghany Corporation's application under Section 20a of the Interstate Commerce Act for authorization to issue such securities, unless and until it found that Alleghany's control of the New York Central

Railroad Company is "consistent with the public interest" within the meaning of Section 5 (2). The questions presented are—

1. Whether the decision of the court below complies with the decision and mandate of this Court in *Alleghany Corporation et al.* v. *Breswick & Co., supra.*

2. If the decision below is consistent with the decision and mandate of this Court.

(a) Whether Alleghany Corporation's acquisition of control of New York Central Railroad Company and its subsidiaries involved an acquisition of control of two or more carriers requiring the Commission's approval under Section 5 (2), and, if so,

(b) Whether the Commission must find that such control is consistent with the public interest before it may authorize under Section 20a the issuance of securities by Alleghany Corporation.

(c) Whether the appellees had standing to raise questions (a) and (b) and whether the District Court was precluded from considering them by the provisions of paragraph (11) of Section 20a.

STATEMENT

This appeal arises out of the decision of the District Court upon remand from this Court in *Alleghany Corporation et al.* v. *Breswick & Co., et al., supra.*

The prior proceedings in the District Court and in this Court. This litigation arose out of a suit instituted by the appellees in the court below challenging (1) orders of the Interstate Commerce Commission, under Section 5 (3) of the Interstate Commerce Act, determining *inter alia*, that Alleghany Corporation "shall be considered as a carrier subject to the provisions of * * * section 20a (2) to (11), inclusive, of the Interstate Commerce Act" (which subject security issues by carriers to the prior approval of the Commission), and (2) an order of the Commission authorizing Alleghany to issue 6% convertible preferred stock and common stock as indicated above. In the first round of this litigation, the court below held that the Commission lacked jurisdiction to determine that Alleghany should be considered as a carrier for the purposes of Section 20a, and, therefore, that the Commission also lacked power to authorize Alleghany to issue securities. Upon appeal, this court reversed the judgment of the District Court, and sustained the Commission's order under Section 5 (3) that Alleghany should be considered as a carrier for the purpose of regulating its issuance of securities. Thereupon, this Court directed that the case be remanded "for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act" (333 U. S. at 175).

The proceedings before the Commission on the Section 20a application. On February 18, 1955, Alleghany filed with the Commission an application (R. 371–392) under Section 20a of the Interstate Commerce Act for authorization to issue not exceeding 1,367,440 shares of 6% convertible preferred stock, $10 par value, in exchange for outstanding shares of its cumulative 5½% preferred stock, Series A, $100 par value, and to issue not exceeding 14,768,352 shares of its common stock upon conversion of the convertible preferred stock. There were outstanding 136,744 shares of the 5½% preferred stock, with accrued and unpaid dividends (as of May 1, 1955) amounting to $132 per share, or an aggregate of more than $17,000,000. It was proposed to offer 10 shares of the new 6% preferred stock, par value $10, in exchange for each share of 5½% preferred, $100 par value, with accrued dividends. The new preferred stock was to be convertible for not less than fifteen years from date of issue into shares of common stock at a ratio to be determined by the closing price of the common on the New York Stock Exchange on the fifth day following authorization by the Commission.

The application recited that the necessary amendments to Alleghany's charter had been approved by the holders of 70% of the outstanding common stock, constituting 97% of the common stock which was voted.

On March 28, 1956, the appellees, Phillips and Breswick & Company who later asserted in the district court (R. 32) ownership of 700 shares of Alleghany common stock out of approximately 4,600,000 shares outstanding, filed with the Comission a petition for leave to intervene (R. 478–480), contending in broad terms that (1) the proposed exchange was not for a lawful purpose, was unfair to Alleghany's common stockholders, and would dilute their equity, (2) that the Commission must apply the standards of the Investment Company Act, (3) that the common stockholders lacked the protection of arms-length bargaining by persons owning only common stock, (4) that the common stockholders would be deprived of a fair return on their investment, (5) that the plan would result in an unnecessarily complex capital structure, and (6) that Alleghany should employ some other method for eliminating the dividend arrearages on its outstanding preferred stock. The appellees requested that Alleghany "be required to support its applications by sworn evidence subject to cross-examination" (R. 480).

On May 26, 1955, Division 4 of the Interstate Commerce Commission issued its report and order authorizing Alleghany to issue securities in accordance with its application, except that it imposed a condition which changed the date for determining the number of common shares into which each share of new preferred would be con-

vertible. In the course of its extensive analysis of the proposed issuance of securities, Division 4 noted that since 1946 Alleghany had engaged in various purchase and exchange programs designed to retire its outstanding preferred stocks and eliminate huge preferred stock dividend arrearages (R. 528), and that "the proposed issue of 6 percent preferred stock would result in a further substantial reduction in the dividend arrearage on the series A preferred stock, and a subsequent redemption of the unexchanged shares of the latter stock would complete the elimination of such arrearage and place applicant's capital structure on a current basis for the first time in over 20 years." (App. C, *infra*, p. 67.) These findings reflect the fact that since 1946 Alleghany had reduced its outstanding 5½% preferred shares (on which no dividends had been paid since 1931) from 667,539 shares to 136,744 shares, and had eliminated the corresponding dividend arrearages.

On June 22, the appellees' petition for reconsideration was denied by the entire Commission, which directed that the order should become effective on that date (R. 554). On June 23, Alleghany began to carry out the exchange, and on the same day, after 900,000 shares of new preferred had been delivered to holders of the old preferred, District Judge Dimock issued an order temporarily restraining Alleghany "from issuing, distributing or transferring any of the

6% Convertible Preferred Stock of Alleghany Corporation" (R. 56). The subsequent proceedings in the district court and before Mr. Justice Harlan are summarized in the prior opinion of this Court (353 U. S. at 158–159).

The proceedings upon remand in the District Court. Following the remand by this Court, the court below received briefs and, on September 5, 1957, it heard oral argument. On September 27, the court below rendered its decision holding invalid the Commission's order authorizing Alleghany to issue the securities here involved.

In its opinion, the District Court found that the Commission's order satisfied the provisions of Section 20a of the Interstate Commerce Act relating to issues of securities. Thus, dealing with the appellees' principal contentions, the District Court held (1) that Alleghany had made an adequate disclosure to the Commission of the various features of the proposed preferred stock exchange, (2) that the Commission's conclusions were "within the range of expert judgment" committed to it by the Congress, (3) that the Commission's findings were adequate, (4) that the Commission's order was not rendered invalid because it imposed a condition changing the date for determining the ratio for conversion of the new convertible preferred stock into common stock, and (5) that under Section 20a (6) the Commission's order

was not invalidated by its refusal to accord appellees an evidentiary hearing. (App. A, *infra*, pp. 29–31.)

However, the district court added that "There nevertheless does remain a major problem—the need for validation of Alleghany's acquisition of the Central System as a prerequisite to the Commission's grant of the relief requested." The District Court then held (1) that the acquisition of control of "an already integrated system of separately existing carriers" requires the Commission's approval under Section 5 (2), and (2) that unless and until the Commission approves Alleghany's control of the New York Central System, the Commission may not exercise jurisdiction under Section 20a to authorize the issuance of securities by Alleghany Corporation.

THE QUESTIONS ARE SUBSTANTIAL

1. We submit that the decision below is in clear conflict with the decision and mandate of this Court in *Alleghany Corporation, et al.* v. *Breswick & Co., et al., supra.*

In its report in *Louisville & Jeffersonville Bridge and Railroad Company Merger, et al.*, 295 I. C. C. 11, 15–16 (R. 511–512), the entire Commission held that its approval under Section 5 (2) was not required where a noncarrier person acquired control of a group of carrier corporations under integrated operating control. That is, the Commission held that such a situation did not

involve an acquisition of control of "two or more carriers" for which its approval is required by Section 5 (2). The district court held to the contrary, both in its opinion on a preliminary injunction (134 F. Supp. 132, 142) (R. 617–618), and in Appendix II to its final opinion (138 F. Supp. 123, 137) (R. 673).

On the prior appeal to this Court, the question was briefed and argued fully by the parties (see, for example, pp. 47–63 of the brief for the Interstate Commerce Commission). In its opinion, this Court discussed the question as follows (353 U. S. at 161–162):

> The District Court held that whatever control Alleghany had over Central did not fit within the statutory requirement of "a person which is not a carrier and which has control of one or more carriers" because the Commission had not given the approval necessary for acquisition of control of Central and its subsidiaries, "two or more carriers."
>
> The Commission and Alleghany contend that Commission approval of the acquisition of a single, integrated system is not necessary. We need not decide this question, however, and intimate no opinion on it, for even if such approval is necessary, the statutory requirement of "a person which is not a carrier and which has control of one or more carriers" refers to "control" and not to "approved control." There

> seems to be no reason to read in the word "approved." Such a holding would mean that the failure of a company engaging in a transaction requiring Commission approval to apply for that approval would deprive the Commission of jurisdiction. Remedies against a violator are provided by § 5 (7), (8), and (9) of the Act. To punish a violator by depriving the Commission of jurisdiction over it would be indeed quixotic. As the Commission points out, the problem would appear clearer were Alleghany contesting, rather than acquiescing in, its jurisdiction.

Thereafter, this Court directed (353 U. S. at 175) that

> the case [be] remanded for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act.

In the district court, the Commission contended[1] that this Court had remanded the case to

---

[1] The United States advised the district court of its position as follows:

"In view of the position of the United States in this case on direct appeal to the Supreme Court, we believe it inappropriate that the United States participate further in these proceedings. However, it should be emphasized that such action on the part of the United States should not be construed either as an approval or disapproval of the stock plan presently in issue before the court."

that court solely for determination as to whether the Commission's preferred stock order satisfied the requirements of the Interstate Commerce Act applicable to the issuance of securities; and that this Court had resolved all necessary questions relating to the Commission's power or jurisdiction to consider and act upon Alleghany's application under Section 20a for authorization to issue securities. However, the district court reasoned as follows (App. A, *infra*, pp. 46–47):

> We have been confronted with the claim that our view is inevitably inconsistent with that of the Supreme Court because otherwise it would not have left undecided the question of whether Commission approval was required with respect to a system of carriers already under common control. We see no reason why the Supreme Court, once it had faced and decided the basic question of conflicting claims of two great administrative bodies, to jurisdiction, should be presumed to have followed to the bitter end every possible ramification of the claims of the private litigants. The holding of the Court did no more than establish the jurisdiction of the Commission and the validity of the status order. The Court dealt with measures it believed necessary to protect the public from evasion of the Act by a possible wrongdoer. It did not suggest that the wrong be overlooked or that, in the absence of any finding that the public interest compelled such action, relief be granted for the

benefit of the wrongdoer, notwithstanding his wrong.

In the prior appeal, this Court held (353 U. S. at 160, 175) that the appellees' standing as common stockholders of Alleghany to challenge the Commission's order under Section 5 (3) that Alleghany should be considered as a carrier for purposes of securities regulations, derived solely from their interest in the dilution of the common stock's equity which they alleged would result from issuance of the new convertible preferred stock as authorized by the Commission. The appellees had standing to challenge only the power of the Commission to issue the preferred stock order. Thus, contrary to the district court, the issue before this Court was not the abstract one of whether Alleghany was subject to regulation under the Investment Company Act or the Interstate Commerce Act, but, rather, was the concrete question of whether the Commission had jurisdiction to determine and act upon Alleghany's application for authority under Section 20a to issue the securities here involved. Under these circumstances, we find it incredible that this Court left unresolved any necessary issue (decided by the court below and briefed and argued by the parties) as to the power of the Commission to exercise its jurisdiction to enter the preferred stock order—the order which was (and is) the sole basis for appellees' standing in this litigation.

2. We submit that this Court was clearly correct in holding that since the Commission had properly determined under Section 5 (3) that Alleghany should be considered as a carrier for the purposes of Section 20a, it was unnecessary to determine whether Alleghany's control of New York Central required approval by the Commission. Section 20a and the last sentence of Section 5 (3) prescribe the findings which the Commission must make before it authorizes the issuance of securities by such a noncarrier person (as Alleghany). Neither of these sections even suggests that the Commission must first of all make a finding as to whether Alleghany's control of New York Central is consistent with the public interest.

Moreover, since lack of approval of Alleghany's control of New York Central did not preclude the Commission from determining under Section 5 (3) that Alleghany's security issues should be regulated under Section 20a, it is entirely illogical to hold that such lack of approval later prevents the Commission from exercising its jurisdiction under Section 20a. If lack of such approval is to have jurisdictional consequences, it should do so on the initial issue of whether the Commission properly asserted jurisdiction under Section 5 (3), rather than to create a limbo during which Alleghany cannot issue securities without approval which the Commission is powerless to grant. The practical consequences of such a sit-

uation are illustrated by the fact that on August 13, 1956, in Finance Docket No. 19422, *Alleghany Corporation Notes,* the Commission, pursuant to Section 20a, authorized Alleghany to issue notes in the amount of $17,000,000 largely to refinance prior notes which were outstanding on a demand basis. The new notes will be due in September 1958. Under the decision below (which fails to give any weight to Section 20a (11), discussed below) these notes may be void, and Alleghany would be prohibited from issuing securities pending administrative and judicial proceedings on the issue of whether its control of New York Central is consistent with the public interest. We do not believe that any such result was contemplated by the opinion and mandate of this Court.

3. In its instant opinion, the court below reiterated its prior conclusion that Alleghany's control of New York Central Railroad Company and its subsidiaries involves control of two or more carriers, within the meaning of Section 5 (2) (b), for which the Commission's approval is required. We will not repeat here our arguments to the contrary in the prior appeal to this Court (I. C. C., br. in No. 114, October 1956, pp. 47–61). It is enough to point out that this aspect of the decision raises the extremely important question of whether Congress intended to require the Commission's approval whenever control of an existing carrier system is acquired by a noncarrier or by several noncarriers acting in concert.

However, starting with this conclusion as a premise, the district court further held that unless and until the Commission approved Alleghany's control of New York Central, it was without power under Section 20a to authorize Alleghany to issue securities. We submit that this holding is not only inconsistent with this Court's mandate but is based upon totally erroneous and irrelevant considerations.

The court below based its conclusion partly upon the provision of Section 5 (7) that where the Commission finds that any person unlawfully controls carriers, "it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuation of such violation." Assuming, arguendo, that Alleghany's control of New York Central is unlawful, nothing in Section 5 (7) even suggests that where, as this Court has held, the Commission has properly determined under Section 5 (3) that Alleghany's security issues shall be regulated under Section 20a, the Commission may not exercise its powers under that section unless and until it has approved such control. Where the Act is silent, the court below is without power to determine the order in which the Commission performs its various functions. *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145–146; *F. C. C.* v. *WJR*, 337 U. S. 265, 272.

The court below sought to buttress its position by noting that Alleghany's holdings of New York

Central common stock are a substantial portion of its assets, by suggesting that after proceeding under Section 5 (7) the Commission might order Alleghany to divest itself of these New York Central shares, and by concluding that "it would be arbitrary" to authorize issuance of Alleghany's new preferred stock without considering the effect of such divestiture upon the asset value of the new preferred "before the stock becomes available for sale to the public." (App. A, *infra*, pp. 37–39.) These considerations are irrelevant to any issues properly before the district court.

No such question of asset coverage was raised by the appellees before the Commission, and they may not raise it in court for the first time. *United States* v. *Capital Transit Co.*, 338 U. S. 286, 291; *United States* v. *Tucker Truck Lines*, 344 U. S. 33, 37. Moreover, it is clear that under any concept of standing to sue, the appellees, as holders of common stock of Alleghany, have no standing to concern themselves with the adequacy of the asset coverage of Alleghany's preferred stock. As this Court held, the appellant's sole standing relates solely to the threatened dilution of the common stock equity. It is settled that the court below lacked power to raise, and determine *sua sponte* issues which were barred to the plaintiff-appellees. *F. P. C.* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 498–501.

In any event, the question of asset coverage of Alleghany's new preferred stock was totally irrel-

evant in the circumstances of this case. To begin with, the new preferred was not to be offered for sale to the public; rather, it was to be offered in exchange for Alleghany's outstanding 5½% preferred stock. Whatever the effect of the conjectured divestiture by Alleghany of New York Central common stock, it would be equally applicable to the old preferred stock and to the new preferred shares to be issued in exchange for it. Moreover, the proposed exchange, by largely eliminating the preferred stock dividend arrearages, would substantially reduce the preferred stockholders' claim against Alleghany's assets. Also, the proceeds from a sale of Alleghany's holding of New York Central stock would simply be substituted for that stock. But, we repeat, the asset coverage of the new preferred is irrelevant, because that question was not open to consideration by the district court.

Also, the district court sought to distinguish, upon unique grounds, the Commission's order authorizing the issuance of new preferred stock from its prior status order under Section 5 (3) which was sustained by this Court. It did so by characterizing the former as "an order for the private benefit of Alleghany," and by adding that "there is no finding of public advantage to be gained from granting Alleghany's application." It furthur stated that "we hold that although there might be circumstances when such action could

reasonably be taken before approving the acquisition of control over the Central system, there were no findings or facts which justify such action in the present case." (App. A, *infra*, pp. 40, 41, 47.)

Briefly, the Commission does not issue orders for the "private benefit" of Alleghany Corporation. It authorized Alleghany to issue new 6% preferred stock in exchange for its outstanding 5½% preferred stock, as the last step in a program to eliminate from Alleghany's capital structure the preferred stock dividend arrearages accrued on the 5½% preferred stock. Since 1946, the outstanding shares of such stock had been reduced from 667,539 shares to 136,744 shares (with dividend arrearages amounting to more than $17,000,000). The issuance of securities by railroad holding companies was subjected to the Commission's jurisdiction under Section 20a for reasons which were illustrated by the Commission in *Chesapeake & Ohio R. Co. Purchase*, 261 I. C. C. 239, 255 (1945) as follows:

> Alleghany, under prior management in times of great financial stress and for its own purposes caused or permitted carrier corporations which it controlled to pay dividends when they were not being earned, or to pay dividends when they were under a heavy burden of debt, when traffic was declining, and earnings were decreasing notwithstanding scrimping of maintenance.

Here, the Commission acted to promote a current financial structure for Alleghany so as to obviate any future pressure or temptation to cause carriers under its control to engage in unsound financial practices. Congress has so empowered the Commission to act in the public interest—not for the "private benefit" of Alleghany Corporation.

Congress has also anticipated the district court's thought that there might be circumstances warranting the Commission's action in authorizing Alleghany to issue new preferred stock prior to approval of its control of New York Central. This Court is aware (353 U. S. at 151) that of the authorized issue of 1,347,440 shares of new 6% convertible preferred stock, approximately 900,000 shares have been physically delivered to old preferred shareholders entitled to receive them. Also, this Court long ago recognized that Congress intended prompt determination of financing proposals subject to Section 20a, in view of the necessity for relating the terms of such transactions to prevailing market conditions. *New York Central Securities Co.* v. *United States*, 287 U. S. 12, at 28. This legislative objective appears not only in the optional hearing provisions of Section 20a (6),[2] but also in the unique command of Section 20a (11) that

[2] Section 20a (6) provides in pertinent part that "The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority."

> no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to *procedure and other matters preceding the entry of such order of authorization.* [Emphasis supplied.]

There has been no judicial construction as to the scope and range of judicial review permitted by Section 20a (11) where, as here, securities have been issued in compliance with an order of the Commission. Presumably, it cuts off review of collateral matters unrelated to the basic legality and fairness of the immediate securities transaction. More important, it represents a finding by Congress that where the Commission has found that a proposed issuance of securities by a railroad holding company subject to Section 20a is both lawful and consistent with the public interest as required by Sections 5 (3) and 20a (2), there is "public advantage to be gained" by permitting it to be carried out before it is made impractical by changing market conditions. Indeed, the underlying issue in this case, after two years of litigation, is whether a voluntary recapitalization which the Commission has found to be in the public interest, in findings now sustained by the court

below, is to be permitted to become effective before it is rendered irrelevant by changing business and market conditions.

The court below repeatedly referred to the Investment Company Act of 1940 as a basis for its conclusion that the Commission cannot authorize Alleghany to issue securities until it has approved its control of New York Central. Thus, the court stated that Alleghany "now claims the advantage of less rigidly restricted financing which the Investment Company Act intended only for a person who had previously satisfied the Interstate Commerce Commission that his control of a carrier would be consistent with the public interest." Again, it stated that the Commission "would be regulating a company which should be properly under the control of another agency; it would be granting a wrongdoer sanctuary from the Investment Company Act; * * *." Congress has not directed or authorized the Interstate Commerce Commission to apply the Investment Company Act to persons whose issuance of securities is subject to regulation under Section 20a. Cf. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 79. The only pertinent provision of the Investment Company Act is Section 3 (c) (9) which exempts from regulation under that Act "any company subject to regulation under the Interstate Commerce Act." As this Court has already held in this case, the Investment Company Act is entirely

irrelevant to the interpretation of the Interstate Commerce Act. Since the Commission validly has asserted jurisdiction to regulate the issuance of securities by Alleghany, it was clear error for the court below to give perhaps controlling weight to the policies which it found in the Investment Company Act.

RELIEF REQUESTED

We contend that the decision below is in clear conflict with the prior decision and mandate of this Court. Moreover, the opinion of the district court suggests no valid reason in law or policy for this Court to reconsider or revise its mandate that "the case be remanded for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act."

Accordingly, we submit that this Court should enter an order summarily reversing the judgment of the district court. Such relief has been granted by this Court in appropriate circumstances. *Franklin* v. *Jonco Aircraft Corporation*, 346 U. S. 868, rehearing denied, 346 U. S. 917; *White* v. *Howard*, 347 U. S. 910. Since the district court has already sustained the Commission's order as complying in all other respects with the requirements of the Interstate Commerce Act, such a

summary reversal would require it to enter judgment in favor of the appellants.[3]

If this Court concludes that its decision and mandate are not offended by the decision below, we submit that the public interest requires determination by this Court at the earliest possible date of the issues raised by the district court in setting aside the Commission's order.

Respectfully submitted.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

NOVEMBER 1957.

---

[3] We contend that the decision of the district court is unassailable insofar as it holds (1) that the Commission was not required to accord a hearing to the appellees, (2) that it was sufficiently informed of the details of the preferred stock exchange, (3) that its findings were adequate, (4) that its conclusion was within the range of discretion entrusted to it by Congress, and (5) that its order was not invalidated by the condition which it imposed. While the appellees are free to contend to the contrary, they must do so in the face of the facts that in Section 20a, as in Section 5, Congress has entrusted the Commission with unusually broad discretionary powers (*McLean Trucking Co.* v. *United States*, 321 U. S. 67, 87–88), and that Section 20a evidences a Congressional purpose to accord a large measure of finality to Commission orders authorizing the issuance of securities.

APPENDIX A

United States District Court,
Southern District of New York

Civ. 101–114

BRESWICK & CO., RANDOLPH PHILLIPS AND MYRON NEISLOSS, AS COMMON STOCKHOLDERS OF ALLEGHANY CORPORATION, INDIVIDUALLY AND ON BEHALF OF ALL OTHER COMMON STOCKHOLDERS OF ALLEGHANY CORPORATION SIMILARLY SITUATED, PLAINTIFFS

AGAINST

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ALLEGHANY CORPORATION, ET AL., DEFENDANTS

Before: CLARK, Circuit Judge, and DIMOCK and WALSH, District Judges.

Appearances: Rosston, Hoft & Brussel, Esqs. (George Brussel, Jr., and Eugene G. King, of Counsel), for Breswick & Co. and Myron Neisloss.

Randolph Phillips, Pro Se.

Robert W. Ginnane, Esq., General Counsel for Interstate Commerce Commission (B. Franklin Taylor, Jr., Assistant General Counsel, with him on the brief).

Simpson, Thacher & Bartlett, Esqs.; White & Case, Esqs.; Wheeler & Wheeler, Esqs. (Whitney North Seymour, David Hartfield, Jr., Edward K.

Wheeler, and David W. Wallace, of Counsel), for Alleghany Corporation.

Proskauer, Rose, Goetz & Mendelsohn, Esqs. (Harold H. Levin, Marvin E. Frankel, and Allen L. Feinstein, of Counsel), for Defendants Joseph S. Gruss, et al.

Edward M. Garlock, Esq., for Defendants Baker, Weeks & Co., Oscar Gruss & Son, Irving Newman as Trustee under a Deed of Trust dated November 6, 1943, and Edward Gornish.

Samuel A. Mehlman, Pro Se.

Alexander Kahan, Esq., and A. Lichtenstein, Esq. (Alexander Kahan, of Counsel), for Adelaide Neuwirth and common stockholders of Alleghany Corporation, respectively.

WALSH, D. J.

Plaintiffs common stockholders of Alleghany Corporation, by this action seek review of an order of the Interstate Commerce Commission authorizing Alleghany to issue certain stock.[1]

---

[1] Briefly the history of this proceeding is as follows:

March 2, 1955—Division 4 of I. C. C. ordered that Alleghany be considered as a carrier subject to its regulation. 290 I. C. C. 725.

April 6, 1955—Plaintiffs, in a related action, *Brewick* v. *Briggs*, sought injunction of present stock issue. The application was denied to permit I. C. C. to give prior consideration to plaintiffs' claim. 130 F. Supp. 953.

May 24, 1955—Full Commission affirmed Division 4's holding as to status. 295 I. C. C. 11.

May 26, 1955—Division 4 approved present stock issue.

June 6, 1955—Present action commended by plaintiffs. No application was made for temporary injunction pending final disposition by I. C. C.

June 22, 1955—Full Commission denied reconsideration of order authorizing stock issue. Notwithstanding plain-

We had previously held that the Commission lacked jurisdiction to promulgate the order and that the issue was subject to the Investment Company Act. The Supreme Court reversed this

---

tiffs' application for a stay the order was made effective immediately.

June 23, 1955—This order was made public but notice thereof was not given plaintiffs. Alleghany immediately commenced issuance of the stock pursuant to the authorization of the Commission.

June 23, 1955—Plaintiffs, having learned of the Commission order after two thirds of the stock had been issued, obtained a restraining order staying transactions with respect to the stock pending disposition of this proceeding.

July 21, 1955—A preliminary injunction was granted by this Court (Hincks, C. J., dissenting). 134 F. Supp. 132.

August 3, 1955—The preliminary injunction was stayed by Mr. Justice Harlan as to that part of the stock issued before this Court's restraining order was granted. 75 S. Ct. 912.

November 18, 1955—Enforcement of the I. C. C. order and issuance of the stock was permanently enjoined, it being held that the Commission was without jurisdiction over Alleghany. 138 F. Supp. 123. Frank, C. J. had replaced Judge Hincks as a member of this Court. This Court stayed the injunction pending appeal. The preliminary injunction as modified by Mr. Justice Harlan, was continued.

April 22, 1957—Supreme Court reversed our holding but declined to vacate the preliminary injunction, remanding the case for reconsideration of claims not previously considered as to the failure of the Commission's order to comply with the Interstate Commerce Act. 353 U. S. 151.

June 14, 1957—An application to this Court to vacate the preliminary injunction was denied. Chief Judge Clark had replaced the late Judge Frank as a member of this Court.

holding and held that the issue was subject to the Interstaate Commerce Act. It remanded the case to us for consideration of plaintiffs' claim that the issue violated that Act.[18]

The stock in controversy consisted of 1,367,440 shares of 6% preferred stock having a par value of $10 to be offered ten for one in exchange for the pre-existing 5½% preferred, having a par value of $100. It was to be convertible at the option of the holder into common stock, according to a formula which resulted in an actual conversion ratio of 4.7 shares of common for each share of new preferred, upon payment to the corporation of $3.75 per common share. The issue of the common stock necessary for conversion was also authorized.

Plaintiffs contend that the Commission's findings as to the fairness of the issue are inadequate and are in conflict with undisputed facts. They claim in substance that the worth of the old preferred was overestimated by giving it a value of $100 par value, plus $5 redemption premium, plus $132 accumulated dividends; that it was improper to include the redemption premium and to assume that the dividends would be readily payable in cash. They suggest that the market value, which never previously exceeded 170, was more realistic and should have been used. They also claim that

---

[18] The scope of the remand was stated as follows, 353 U. S. at p. 175:

"For all these reasons, the judgment of the District Court must be reversed and the case remanded for consideration by the District Court of appellees' claim, not previously discussed, that the preferred stock issue as approved by the Commission was in violation of the Interstate Commerce Act. * * *"

the value of the new preferred was underestimated; that in particular the value of the fifteen year non-call period allowed for conversion was overlooked entirely, although it became markedly apparent when, after the plan of exchange was announced, the market price of the preferred exceeded the $237 value assumed for purposes of the exchange, by almost fifty percent. In other words, whereas the old preferred had never sold above $170 prior to the announcement of the plan, its equivalent in the new preferred traded upon a "when issued" basis rose to 352½ prior to the suspension of trading. They claim that the excess of 352½ over 170 represents a "premium" to the preferred stockholders, an excessive benefit at the expense of the corporation and thus the common stockholders.

In answer it is contended that the offer of the exchange was the only feasible way in which to get rid of the burden of accumulated dividends without requiring a large outlay of cash; that the benefits to be given the new preferred in order to make the exchange attractive was primarily a matter of business judgment; that the market action of the preferred does not indicate that an excessive premium was given it at the expense of the common because a substantial part of the increase paralleled an increase in the common into which the new preferred was convertible.

As to these contentions of the plaintiffs, we believe that the facts disclosed to the Commission and available as matters of public knowledge were enough to put an expert body on notice of all the alleged undesirable qualities of the issue; that the

questions so raised were within the range of expert judgment reserved to the Commission; that its findings thereon satisfy the statute; and that we may not substitute our views for those it expressed.

Plaintiffs also protest that the Commission conditioned its approval upon the change in plan never ratified by the stockholders. The proposed plan had provided that the conversion ratio should be fixed as of the fifth market day following Commission approval. The Commission conditioned its approval upon modification of the exchange offer so that the conversion ratio would be fixed as of the last market day preceding its order. The Commission has power to grant the application "upon such terms and conditions as the commission may deem necessary or appropriate in the premises." 41 Stat. 594, 49 U. S. C. § 20a (3). The question whether the exchange would involve a violation of some contractual arrangement with the stockholders is not before us. This contention does not affect the validity of the Commission's order.

As to matters of procedure, plaintiffs complain that they were entitled to an evidentiary hearing before the Commission and that they were deprived of that right. This point was raised before the Supreme Court and, if not decided adversely to them, we understand the Supreme Court's statement that the point is governed by section 20a (6) of the Interstate Commerce Act, 41 Stat. 459, 49 U. S. C. § 20a (6), to restrict our consideration to the effect of that section. Under that section the Commission has almost free discretion as to how it may best proceed with its in-

vestigation. It was not required as a matter of law to hold evidentiary hearings to enable plaintiffs to amplify by cross-examination of corporate officers points already ascertainable from facts before it. Plaintiffs urge the admitted complexity of the plan and the heavy investment in preferred stock by the dominant officer of Alleghany just before announcement of the plan. They also show that by refusing to thus open its investigation the Commission apparently missed evidence subsequently supplied to the Securities and Exchange Commission, such as a memorandum from Alleghany's files discussing the value of the noncall period, the minutes of the board meeting which are said to show that this feature was not in the plan when originally approved, and an analysis of the market action of earlier conversion warrants which might have foretold the market action of the preferred after the present plan closed. Loss of this type of evidence is, however, a known risk which an agency takes when it declines to open its investigation to controversy. The Commission is given that power by statute.

There nevertheless does remain a major problem—the need for validation of Alleghany's acquisition of the Central system as a prerequisite to the Commission's grant of the relief requested. We do not raise again the question of jurisdiction;[2] but we now raise the question of findings

[2] The Supreme Court held that jurisdiction could be based upon its unapproved acquisition of control as well as approved. (353 U. S. at pp. 161–2). It said:

"The District Court held that whatever control Alleghany had over Central did not fit within the statutory

necessary as a preliminary to relief on the merits, action necessary if the order of the Commission is to conform with the Interstate Commerce Act.

The facts now established are that Alleghany has control of the New York Central and that the Central is itself a carrier with control of a large number of other carriers. The Commission was never asked to approve Alleghany's acquisition of control over this group of carriers and has carefully refrained from so doing.[2a]

---

requirement of 'a person which is not a carrier and which has control of one or more carriers' because the Commission had not given the approval necessary for acquisition of control of Central and its subsidiaries, 'two or more carriers.'

"The Commission and Alleghany contend that Commission approval of the acquisition of a single, integrated system is not necessary. We need not decide this question, however, and intimate no opinion on it, for even if such approval is necessary, the statutory requirement of 'a person which is not a carrier and which has control of one or more carriers' refers to 'control' and not to 'approved control.' There seems to be no reason to read in the word 'approved'. Such a holding would mean that the failure of a company engaging in a transaction requiring Commission approval to apply for that approval would deprive the Commission of jurisdiction. Remedies against a violator are provided by § 5 (7), (8), and (9) of the Act. To punish a violator by depriving the Commission of jurisdiction over it would be indeed quixotic. As the Commission points out, the problem would appear clearer were Alleghany contesting, rather than acquiescing in, its jurisdiction."

[2a] Inasmuch as the full Commission believed its approval unnecessary this was a matter considered only by Division 4. See *Louisville & J. B. & R. Co. Merger*, 290 I. C. C.

This problem presents two separate questions: (1) does the acquisition of an already integrated system of separately existing carriers require Commission approval under subdivision 2 of section 5; and (2) if it does, may the Commission proceed to regulatory determinations, deferring meanwhile the question of whether it will authorize the continuation of this control, upon which its jurisdiction over Alleghany depends. The second question becomes more pointed where, as here, the assumption of regulatory responsibility by the Commission shields the person guilty of the unapproved acquisition from regulation by another agency.

With respect to the first question, until this case arose, it had been the consistent view of the Commission that its approval of such an acquisition of control and its finding of consistency with the public interest was required. *Arkansas & L. M. Ry. Co.—Control,* 282 I. C. C. 254; *Weinstein-Control-Capital Transit Co. and Montgomery,* 56 M. C. C. 127; *Seaboard Air Lines Ry. Co.—Receivership,* 261 I. C. C. 689. This view was well expressed by Division 4 in its opinion with respect to Alleghany's application for authority to merge one of the Central's subsidiaries, the Louisville & Jeffersonville Bridge and Railroad Company,

725, 733, 744, 746. These findings are also printed in the Record on Appeal to the Supreme Court, *Alleghany Corp.* v. *Breswick & Co.* (353 U. S. 151). See pp. 425, 435, 441–2. The finding of consistency with the public interest, insofar as it related to control was restricted to the properties and franchises of the Louisville & Jeffersonville Bridge and Railroad Company, 290 I. C. C. 725, 747; Record, op. cit., p. 443.

290 I. C. C. 725, 733–4.[2b] The full Commission departed from this position and held to the contrary. 295 I. C. C. 11.[3] We reversed the Commission holding[4] and we in turn were reversed upon other grounds. The Supreme Court left the question open.[5]

Without going into the question of whether our previous determination in this regard remains the law of the case we express afresh our conclusion that such approval is required. The statute unequivocally requires Commission approval for the acquisition of two or more carriers by any person. It reads:

> It shall be lawful, with the approval and authorization of the Commission * * * for a person which is not a carrier to acquire control of two or more carriers * * *. (§ 5 [2] [a].)

Its language does not suggest any exceptions and certainly none on the basis of common control by someone else having been previously authorized. It seems to us that as long as the carriers remain unmerged and unconsolidated, the Commission has full power and the duty to decide whether control of them all or any of them by the proposed new person is in the public interest. This was the unchallenged prior consistent administra-

[2b] Record, op. cit., pp. 425–7.

[3] Its opinion has not yet been bound. It may be found in the Record on Appeal to the Supreme Court, Record, op. cit., pp. 506–515. The brief discussion of the subject occurs at p. 512.

[4] 134 F. Supp. 132, 143–44; 138 F. Supp. 123. 137–38.

[5] 353 U. S. at p. 161.

tive interpretation by the Commission.[6] The full reasons for our holding were expressed in our earlier opinion at 134 F. Supp. 132, 142, and in Appendix II to our per curiam opinion at 138 F. Supp. 123, 137. We reaffirm them. We believe our view is strengthened by the emphasis in the Supreme Court's opinion upon the importance of keeping sight of the individual entities within the system. (353 U. S. at p. 170.) [6a]

---

[6] In *Louisville & J. B. & R. Co. Merger*, 290 I. C. C. 725, 733, Division 4 said:

"The Central system includes many individual carriers which are controlled by Central through stock ownership or otherwise. We long have recognized under section 5, that railroad systems are comprised of 2 or more carriers, and that control of a single system may not lawfully be effectuated without our approval and authorization." [Citing *Seaboard Air Line Ry. Co. Receivership*, 261 I. C. C. 689, 717. *New York S. & W. R. Co. Reorganization*, 282 I. C. C. 801 (not printed in full). *Arkansas & L. M. Ry. Co. Control*, 282 I. C. C. 254, 260. *Weinstein-Control-Capital Transit Co. and Montgomery*, 56 M. C. C. 127, 131. *Stoughton-Control-Delaware Coach Co.*, 57 M. C. C. 456. *Kittrell-Control-Dixie Motor Coach Corp.*, 37 M. C. C. 91.] That principle is considered basic, almost as a definition. So much so, that the question of acquisition of a carrier system has never been contested before the Commission, and as far as we know, there have been no court decisions touching on that issue. Nevertheless, because of the stress which Alleghany places on this point, some discussion thereof is necessary."

[6a] In earlier stages of the litigation defendants have expressed fear that injecting the Commission into proxy contests would unduly interfere with stockholder suffrage. As we pointed out in an earlier opinion, 134 F. Supp. 132, 144, although this concern might have relevance where control was acquired other than by the acquisition of a controlling block of corporate stock by a single person, or a

If our conclusion in this regard is to stand, subdivision 4 of section 5 provides in emphatic terms that Alleghany's unauthorized seizure of control of the Central and its subsidiaries was unlawful and that its continued control of these carriers is unlawful as well.

Subdivision 7 of that section mandates action by the Commission to compel correction of violations of this particular subdivision, once the facts are known. It provides:

> The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). *If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation.* The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2) and (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this

---

small concerted group of persons, there were no findings that such was the case here. On the contrary, a significant part of the Commission's regulation of Alleghany has concerned the acquisition of such a block of Central's stock and coordinated activities of Alleghany's officers as individual stockholders of Central. See *Chesapeake & O. Ry. Co.—Purchase*, 271 I. C. C. 513 (1948).

chapter shall apply to such a violation by another person. [Emphasis added.]

Ordinarily, if the facts were less conclusive, the Commission would commence its own investigation which would proceed concurrently with the investigation concerning Alleghany's application. Here, however, there is no question of further investigation, the facts are undisputed; the Commission's findings are complete.[7] This point was inescapable because the Commission's power to pass upon the issuance of stock by Alleghany which it exercised depended upon the fact that Alleghany controlled the New York Central system. The question is simply one of law. The Commission, after reversing Division 4, proceeded to the merits of Alleghany's various applications, on the assumption that Alleghany's control of the carriers in question was lawful. This view was erroneous.

Under these circumstances, should authorization of the issue of stock be permitted to stand? We do not see how the adequacy of the security of the new preferred could be calculated until this question is resolved or at least considered. Alleghany's investment in the Central system, as last shown in the record, was $14.7 million, over

[7] The findings are to be found in *Louisville & J. B. & R. Co. Merger*, *supra.*, 290 I. C. C. 725, at pp. 733, 741, Record, op. cit., pp. 425, 435. (Division 4) and 295 I. C. C. 11, 6, Record, op. cit. pp. 511-12, 513 (full Commission).

¼ of its total portfolio.[8] As long as Alleghany's control of Central is unapproved, it is subject to injunction, divestiture and other sanctions.[9] The effect of this cloud upon the value of the stock is a matter for expert consideration rather than our speculation. In the absence of compelling reasons to the contrary, as to which no findings were made,[10] authorization of continued control should logically be determined before the stockholders act upon the proffered exchange and before the stock becomes available for sale to the

---

[8] The schedule of Alleghany's investments as of December 31, 1954 was as follows (Record, op. cit., p. 186):

	Cost	Indicated market quotations
New York Central Securities	$6,918,118	$9,607,800
Alleghany share of joint ventures in Central investments (See Note (3) Record p. 169)	7,500,000	10,050,000
	14,418,118	19,657,800
Total investments	33,342,393	67,944,633

[9] As to carriers, the usefulness of these assets may also be subjected to other restrictions. See *Bonds of St. Louis-S. F. Ry. Co.*, 150 I. C. C. 139 (1928), in which an unapproved acquisition by a carrier was held to be not capitalizable. The extent to which analogous restrictions might apply to the financing of a person not a carrier is a matter for consideration by the Commission.

[10] The only findings of possible significance in this regard are that the plan was a further step in a program initiated eight years earlier, in September, 1946; that it will eliminate dividend arrearages and give the preferred stockholders an opportunity to participate in the "progress of the applicant". Record, op. cit., pp. 528–530. Contrast the findings by Division 4 as to why Alleghany should be required to report as a carrier notwithstanding the illegality of the manner by which it obtained its status. *Louisville & J. B. & R. Co. Merger*, *supra*, 290 I. C. C. 725, at p. 741.

public, not afterwards. To say the least, it would be arbitrary to authorize the issue without even considering the effect of divestiture upon the value of this important asset as long as that action remains a possibility. Reconsideration by the Commission for that purpose is therefore necessary. The Commissioner's duty under section 20 (a) is for the protection of investors as well as persons dependent upon transportation."

---

[11] While the dominant purpose of § 20 (a) was to ensure sound railroad financing in the interest of the proper development of our transportation system, an important related aim was "to protect the investing public against the dissipation of railroad resources through faulty or dishonest financing" (Sharfman, The Interstate Commerce Commission, Vol. I, pp. 189, 190).

Throughout the history of this legislation, there was universal recognition of the interrelation of sound railroad financing and the protection of investors, the latter being essential to maintaining confidence in railroad investment. 58 Cong. Rec. 9160, 9163 (66th Cong., 1st Sess.); Sharfman, The Interstate Commerce Commission, pp. 190–191 (1931).

"* * *If the people who have money will not invest it in the transportation enterprise, private ownership and operation under public control must necessarily fail. It is apparent, therefore, that any legislation which may be proposed upon the hypothesis of private ownership and operation must tender to the future investor reasonable security for the investment he is asked to make and reasonable assurance of such yearly return upon his money as will induce him to enter the field." Senate Report No. 304, 66th Cong., 1st Sess. (1919).

See also testimony of Commissioner Clark, Hearings before the Senate Committee on Interstate Commerce on Extension of Tenure of Government Control of Railroads, Vol. I, p. 343 (1919); The New England Investigation, 27 I. C. C. 560, 616 (1913); Matter of Consolidations & Com-

Neither do we see how an order for the private benefit of Alleghany may be said to be in compliance with the Act when Alleghany's status under the Act and sole basis for claiming to be entitled to this relief, or any relief under the Act,

---

binations of Carriers, 12 I. C. C. 277, 306 (1907); see also 21st Annual Report of Interstate Commerce Commission, p. 24 (1907).

In 1913 and 1916, the House of Representatives passed legislation which substantially incorporated the provisions of the present § 20 (a). The House Reports on these bills indicate recognition of the fact that one of the aims of the statute was to protect investors from the abuses of speculative financing. H. R. Report No. 681, pp. 3, 4 (63rd Cong., 2d Sess., 1914); H. R. Report No. 349, pp 8, 9 (64th Cong, 1st Sess., 1916). This was made explicit by a question addressed to Mr. Rayburn, a member of the House Committee on Interstate and Foreign Commerce, during debate on the 1913 bill:

"Mr. McKenzie. Is it not one of the main purposes of this bill to give stability and value to railroad stocks and bonds for the protection of the men and women who invest their money in these stocks and bonds in good faith, so that the rate to be charged by the railroads is not the only material fact in the bill?

"Mr. Rayburn. It [the rate charged] is not; but the gentleman's question answers itself and answers it much better than I can, and I thank him for it."

51 Cong. Rec. 0687 (63rd Cong., 2d Sess., 1914).

By exempting carrier securities from any states or Securities and Exchange Commission regulation, Congress has given further evidence that it looks to the I. C. C. to protect the welfare of investors in considering stock issues under § 20 (a). It is impossible to believe that Congress could have intended investors in carrier securities to be left without any of the protections afforded other investors. When Congress exempted corporations like Alleghany from compliance with the provisions of the Invest-

is that of a wrongdoer in unlawful control of a group of carriers. Here there is no finding of public advantage to be gained from granting Alleghany's application. Unlike the status order, which made available to the Commission information for the protection of the public or even the merger of the Bridge Company which was expected to produce operating economies of ultimate value to the public, the present order is unaccompanied by any finding of fact which would suggest a rational basis for action in advance of an investigation into the legality of Alleghany's acquisition of control. Here an investment company has been barred from issuing the stock in question by the Securities and Exchange Commission. In violation of the Interstate Commerce Act it has obtained control of a group of carriers. Solely upon the basis of this violation it now claims the advantage of less rigidly restricted financing which the Investment Company Act intended only for a person who had previously satisfied the Interstate Commerce Co mission that his control of

---

ment Company Act, it manifested no intent to deprive stockholders in such companies of the safeguards provided for other investment companies, but merely an intent to avoid dual regulation.

In this regard we modify the view we expressed in our earlier opinion, 134 F. Supp. 132, 140, footnote 9, in which we said:

"The I. C. C. control with respect to the issuance of securities is merely to protect against over-issue, not to hold the balance between management and investor."

This was an overstatement; its emphasis upon the Commission's primary responsibility neglected the secondary duty to protect public investors.

a carrier would be consistent with the public interest. The Interstate Commerce Act was never intended as a source of relief for a person in illegal control of a carrier. Such a person might be subject to all the burdens and duties imposed by the Act upon a person in legal control, but relief or benefit for such a person may not be rationally authorized under the Act, except upon finding that the public interest required such authorization notwithstanding that person's violation of the Act. In the absence of any finding that immediate action is needed in the public interest, as distinguished from the private interest of Alleghany, the stock authorization should await an appropriate application for approval of its control.

Further, reconsideration by the Commission is required because, once the error of law is recognized, the Commission's action would be in arbitrary conflict with its own settled policy, to compel prompt application for approval of acquisition of control where required under the Statute, a conflict with which the Commission was not faced so long as it believed approval of acquisition of an integrated system unnecessary. It has consistently denied relief sought by those in illegal control [12] and usually compelled divesti-

[12] It is the practice of the Commission when an application discloses an underlying violation of section 5 to commence its own investigation into the violation which is conducted concurrently with the investigation of the application. In the absence of exceptional circumstances the application will be denied and divestiture ordered. Cases in which applications for merger were denied because of prior unauthorized control are: *Gisinger–Inves-*

ture [13] except where it has found continuation of the control clearly in the public interest and, in most cases, that the failure to request approval

---

tigation of Control, 60 M. C. C. 321, 327 (1954); *Transcontinental Bus System, Inc.-Inv. of Control* (Arkansas Motor Coaches), 57 F. C. C. 323 (1951); *Pacific Greyhound Lines-Control and Merger*, 56 M. C. C. 415, 434, 440 (1950); *Hodge-Control*, 40 M. C. C. 499 (1946). In *Gisinger-Investigation of Control*, *supra*, 60 M. C. C. 321, 327, 329 (1954) it was said:

"The application in this proceeding is in effect a request for validation of the existing unlawful control. The merger of the properties is merely a second step to change the form of the control already unlawfully in effect. The act contemplates that consideration be given to 'proposed' transactions under section 5. Although it has been stated that such violations of section 5 are not an absolute bar to approval, each case must be considered on its merits * * * ". (327)

* * * * *

"* * * In effect, applicants would have us ignore the unlawful control which has now continued for some years, and authorize the merger on the basis of the evidence presented, which is largely based on the unlawful control and the operations thereunder and directed primarily to the merger. The real issue is whether the common control of these carriers should be sanctioned under the circumstances presented. In our opinion this record shows such a flagrant disregard for the law that divestiture should be ordered." (329.)

Cases in which the Commission has refused to approve purchases of stock for this reason are: *Kolowich-Control*, 58 M. C. C. 599, 609 (1952); *Welch-Control*, 56 M. C. C. 505 (1950); *Mooney-Control*, 56 M. C. C. 771 (1950); *Pacific Greyhound Lines-Control and Merger*, *supra*, 56 M. C. C. 415, 434 (1950); *Casser-Investigation of Control*, 57 M. C. C. 53, 67 (1950) and 55 M. C. C. 696 (1949); *Hodge-Control*, *supra*, 40 M. C. C. 499 (1946);

was in good faith [14] due to an oversight. Reopening of the Commission proceeding is necessary so that the Commission may give consideration to such findings here.

Finally, for even more fundamental reasons this order must be set aside. Although the Su-

---

Manlowe-Control, 45 M. C. C. 125 (1946). Cases denying applications to transfer operating rights for this reason are: *Interstate Motor Freight System-Purchase*, 65 M. C. C. 37, 53 (1955); *Myrick-Purchase*, 57 M. C. C. 1 (1950); *Jones-Purchase*, 57 M. C. C. 105 (1950); *Texas, New Mexico & Oklahoma Coaches, Inc.-Purchase*, 55 M. C. C. 269 (1948); *Congdon-Purchase*, 50 M. C. C. 781 (1948); *McRae-Purchase*, 45 M. C. C. 636 (1947); *Mitchell-Purchase*, 40 M. C. C. 283 (1945); *Tornetta-Purchase*, 40 M. C. C. 339, 343 (1945).

Similarily, it has refused to approve an issue of securities for the purpose of financing an unapproved acquisition. *Bonds of Chesapeake & O. Ry. Co.*, 150 I. C. C. 257, 259–60 (1929).

[13] Denial of applications is usually accompanied by compelled divestiture, although sometimes left to be accomplished voluntarily or by subsequent proceeding. Divestiture was ordered in *Gisinger-Investigation of Control; Transcontinental Bus System, Inc.-Inv. of Control; Pacific Greyhound Lines-Control and Merger; Myrick-Purchase; Kilovich-Control; Mooney-Control; Casser-Investigation of Control; McRae-Purchase; Manlowe-Control*; op. cit.

[14] In *Casser-Control-Bingler Vacation Tours, Inc.*, 57 M. C. C. 53, 67, the Commission said:

"* * * and we have given our approval to concluded transactions under that section [§ 5] only in comparatively rare instances where the parties had acted in entire good faith, appropriate applications were filed promptly upon apprisal of the unlawfulness, and the transaction clearly was consistent with the public interest."

The fact that the applicant was in good faith unaware of illegality, is a significant consideration. *Coast Lines Truck Service, Inc.-Control and Merger*, 58 M. C. C. 115, 131 (1951); *Consolidated Truck Lines-Control and*

preme Court has eliminated all doubt as to the Commission's jurisdiction—its power to decide the question here presented—it has not excused it from the need for making this decision, and making it in a logical sequence with respect to other regulatory decisions. The sequence of Commission determination may not be in arbitrary and capricious disorder; it must have a rational basis just as each order must in itself have such a basis. The approval of acquisition and continued control is an obvious first question in any application by Alleghany because unless the Commission intends to approve this control, it would be regulating a company which should be properly under the control of another agency; it would be granting a wrongdoer sanctuary from the Investment Company Act; and it would be authorizing and ordering acts in aid of a known violation of the Interstate Commerce Act. The ultimate crucial result of such temporizing would be that by granting seemingly innocuous piecemeal applications, it would unobtrusively foreclose itself from any

---

Merger, 57 M. C. C. 277, 281 (1951); *Sims-Purchase*, 40 M. C. C. 228, 230 (1945). In some cases applications have also been granted because there is a strong public interest in continuance of service which might be disrupted if divestiture were ordered; in other words, the violation is tolerated in the interest of the public, not out of consideration for the violator. *Baggett-Control*, 65 M. C. C. 522, 525 (1955); *Potomac Coach Lines, Inc.-Purchase*, 57 M. C. C. 199, 207 (1950); *Capitani-Control*, 57 M. C. C. 413, 420 (1951); *Bowman-Control*, 55 M. C. C. 802 (1949); *Commercial Petroleum and Transport-Control*, 58 M. C. C. 439, 459 (1952); *Lee-Control*, 50 M. C. C. 163, 168 (1947). Cf. *Cochrane-Purchase*, 40 M. C. C. 233, 257 (dissenting opinion) (1945).

realistic determination of the fundamental question, because after the passage of time the disruption of the carriers in the system and of the public service, caused by divestiture, would be so great that it would necessarily be discarded as a practical alternative.[15]

We have been confronted with the claim that our view is inevitably inconsistent with that of the Supreme Court because otherwise it would not have left undecided the question of whether Commission approval was required with respect to a system of carriers already under common control. We see no reason why the Supreme Court, once it had faced and decided the basic question of conflicting claims of two great administrative bodies, to jurisdiction, should be presumed to have followed to the bitter end every possible ramification of the claims of the private litigants. The holding of the Court did no more than establish the jurisdiction of the Commission and the validity of the status order.[16] The Court dealt with measures it believed necessary to protect the public from evasion of the Act by a possible wrongdoer. It did not suggest that the wrong be

---

[15] Although the Commission consistently points out that an illegal acquisition does not become protected by the passage of time or the prior knowledge of the Commission or its grant of other applications, (see *Transcontinental Bus System, Inc.-Inv. of Control, supra*, 57 M. C. C. 323, 334), there is no doubt that the disruption of the public service by delayed divestiture will weigh against the exercise of this sanction. See *Commercial Petroleum & Transport Co.-Control, supra*, 58 M. C. C. 439, 459.

[16] The plaintiffs were held not to be interested parties for the purpose of being heard before the entry of the merger and status orders. 353 U. S. 151, 173-175.

overlooked or that, in the absence of any finding that the public interest compelled such action,[17] relief be granted for the benefit of the wrongdoer, notwithstanding his wrong.

We have now recognized the Commission's jurisdiction. This unquestionably includes the power to authorize the issue of preferred stock in question but we hold that although there might be circumstances when such action could reasonably be taken before approving the acquisition of control over the Central system, there were no findings or facts which justify such action in the present case.

Accordingly, judgment must be granted in favor of plaintiffs. A judgment will be entered setting aside the order of the Commission authorizing the issue of the preferred stock and enjoining acts of the defendants in furtherance thereof. Defendants may apply for a thirty day stay of enforcement to enable them to perfect an appeal to the Supreme Court. The preliminary injunction in its present form shall continue until further order of the Court.

Settle order on notice.

(S) CHARLES E. CLARK,
U. S. C. J.

(S) E. J. DIMOCK,
U. S. D. J.

(S) LAWRENCE E. WALSH,
U. S. D. J.

Dated September 27, 1957.

---

[17] Cf. Division 4 findings, *Louisville & J. B. & R. Co. Merger*, *supra*, 290 I. C. C. 725, 741; Record, op. cit., p. 435.

APPENDIX B

United States District Court, Southern District of New York

Civ. 101–114

BRESWICK & CO., RANDOLPH PHILLIPS AND MYRON NEISLOSS, AS COMMON STOCKHOLDERS OF ALLEGHANY CORPORATION, INDIVIDUALLY AND ON BEHALF OF ALL OTHER COMMON STOCKHOLDERS OF ALLEGHANY CORPORATION SIMILARLY SITUATED, PLAINTIFFS

AGAINST

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ALLEGHANY CORPORATION, ET AL., DEFENDANTS

Final Judgment

This action to enjoin and set aside certain orders of the Interstate Commerce Commission authorizing Alleghany Corporation to issue certain stock and to enjoin Alleghany Corporation, having come on for final hearing, on remand from the Supreme Court of the United States, on September 5, 1957, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321–2325 of Title 28 of the United States Code, consisting of the undersigned judges; and the court having considered the pleadings, evidence and the briefs and having heard the arguments of counsel for the respec-

tive parties, and being fully advised in the premises; and on September 27, 1957 having filed its opinion herein containing its findings of fact and conclusions of law; now, in accordance with said opinion, findings and conclusions, it is

Ordered, adjudged and decreed that the orders of the Interstate Commerce Commission, dated May 26, 1955 and June 22, 1955, entered in Finance Docket No. 18866, authorizing Alleghany Corporation to issue (a) not exceeding 1,367,440 shares of 6% convertible preferred stock, par value $10 a share, to be offered to the holders of its cumulative 5½% preferred stock, Series A, par value $100 a share, in exchange, on the basis of 10 shares of 6% convertible preferred stock for each share of cumulative 5½% preferred stock, Series A, and (b) not exceeding 14,768,352 shares of common stock, par value $1 a share, upon conversion of such 6% convertible preferred stock on the basis set forth in the application of Alleghany Corporation and the report of the Interstate Commerce Commission, be and they hereby are enjoined, set aside, annulled and suspended: and it is

Further ordered, adjudged and decreed that Alleghany Corporation, its transfer agents, officers, directors, servants and employees, be and are hereby enjoined from taking any steps in connection with or in furtherance of the issuance of said 6% convertible preferred stock in exchange for said 5½% preferred stock, or for any other purpose, or the transfer thereof, and it is

Further ordered, adjudged and decreed that the enforcement of this judgment and the injunc-

tions issued herein, subject to the exceptions stated in the next paragraph, is hereby suspended for a period of 30 days from the date hereof to permit any defendant or defendants in this action to file notice of appeal to the Supreme Court of the United States from this judgment and the injunctions contained herein, and upon the filing of said notice of appeal by any defendant in this action, the enforcement of this judgment and the injunctions contained herein shall be further suspended until the issuance of the order of this court upon the mandate from the Supreme Court of the United States, and it is

Further ordered, adjudged and decreed that the stay pending appeal provided by the foregoing paragraph, except to the extent provided in the next paragraph, shall not apply to so much of said judgment and injunctions as is directed to Alleghany Corporation, its transfer agents, officers, directors, servants or employees, and it is

Further ordered, adjudged and decreed that, despite the provisions of the last preceding paragraph the stay provided by the paragraph last but one shall apply to said judgment and injunctions to the extent that they enjoin Alleghany Corporation, and its transfer agents, officers, directors, servants or employees from transferring the 900,000 shares of 6% convertible preferred stock delivered prior to the stay granted by Mr. Justice Harlan on August 3, 1955 in connection with the previous appeal herein.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to apply to the court at any time upon

the expiration of the stay provided herein for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, for the modification or termination of any of the provisions thereof for the enforcement of compliance therewith and for the punishment of violations thereof.

Dated: New York, N. Y., October 17, 1957.

CHARLES E. CLARK,
U. S. C. J.

E. J. DIMOCK,
U. S. D. J.

LAWRENCE E. WALSH,
U. S. D. J.

APPENDIX C

This report will not be printed in full in the permanent series of Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 18866

ALLEGHANY CORPORATION STOCK

Submitted April 14, 1955. Decided May 26, 1955

Authority granted to issue not exceeding (a) 1,367,440 shares of 6-percent convertible preferred stock, par value $10 a share, to be offered to the holders of applicant's cumulative 5½-percent preferred stock, series A, par value $100 a share, in exchange, on the basis of 10 shares of 6-percent convertible preferred stock for each share of cumulative 5½-percent preferred stock, series A, and (b) 14,768,352 shares of common stock, par value $1.00 a share, upon conversion of such 6-percent convertible preferred stock, on the basis set forth herein. Condition prescribed, and the order made effective 10 days from its date.

Burton K. Wheeler and *Edward K. Wheeler* for applicant.

George Brussel, Jr. and *Joseph B. Hyman* for interveners in opposition to the application.

Randolph Phillips, pro se, intervener in opposition.

DIVISION 4. COMMISSIONERS JOHNSON, MITCHELL AND TUGGLE

BY DIVISION 4:

The Alleghany Corporation, by an application filed February 18, 1955, applied for authority under section 20a of the Interstate Commerce Act to issue not exceeding 1,367,440 shares of 6-percent convertible preferred stock, hereinafter sometimes called 6-percent preferred stock, in connection with an exchange of such stock for shares of its cumulative 5½-percent preferred stock, series A, hereinafter sometimes called series A preferred stock, and to issue not exceeding 14,768,352 shares of its common stock, upon conversion of such 6-percent preferred stock. No representation respecting the application has been made by State authority. By order entered April 20, 1955, Breswick & Co., Lewis D. and John Gilbert, and Randolph Phillips, alleged stockholders of the applicant, were permitted to intervene in opposition to the application. These interveners requested that the application be assigned for hearing, but they described no evidence which they would produce if a hearing were assigned, and alleged no facts which would justify such assignment. In our opinion, no hearing is necessary to enable use to determine our decision upon the application.

The applicant was incorporated under the laws of the State of Maryland on January 26, 1929. It is authorized by its certificate of incorporation, as amended, among other things, to acquire by purchase, subscription, or otherwise, and to own,

hold for investment, use, sell, assign, transfer, mortgage, pledge, exchange, or otherwise dispose of securities. Its holdings include the securities of certain railroad companies, including the New York Central Railroad Company.

By our order of March 2, 1955, in Finance Docket No. 18656 et al., *Louisville & Jeffersonville Bridge & R. Co. Merger*, 290 I. C. C. 725, we approved and authorized, among other things, subject to certain conditions, merger of the properties and franchises of the Louisville & Jeffersonville Bridge & Railroad Company into the Cleveland, Cincinnati, Chicago and St. Louis Railway Company for ownership, management, and operation, and through the ownership of stock of the latter company, continuation of control of the properties and franchises of the former company by the New York Central Railroad Company and the Alleghany Corporation. The order further provided that unless and until otherwise ordered by this Commission, the Alleghany Corporation is to be considered as a common carrier subject to the provisions of section 20 (1) to (10), inclusive, and section 20a (2) to (11), inclusive, of the Interstate Commerce Act, as amended, to the same extent that those provisions are applicable to the New York Central Railroad Company and its carrier subsidiaries and affiliates.

At a special meeting held on December 28, 1954, applicant's board of directors, hereinafter called the board, resolved that it was desirable that applicant's certificate of incorporation, hereinafter called the certificate, be amended to create 1,367,440 shares of a new class of stock to be known as 6-percent convertible preferred stock, par value

$10 a share, convertible into shares of common stock, junior to the class of its $4 prior preferred convertible stock and senior to the existing class of preferred stock (of which the series A preferred stock is a series), and to its common stock, and to increase the authorized shares of common stock from 12,350,000 to 22,000,000 shares, so as to provide a sufficient number of shares into which such 6-percent preferred stock will be convertible. At a special meeting of applicant's stockholders held on February 8, 1955, as required by the certificate, the holders of two-thirds of the outstanding shares of $4 prior preferred convertible stock and of substantial majorities of the outstanding shares of series A preferred stock and common stock, voting as separate classes approved the proposed amendments, and on that date appropriate articles of amendment of the certificate were filed with the State Tax Commission of the State of Maryland. The certificate, as so amended, provides for a total authorized capital stock of 24,895,807 shares, comprised of 28,367 shares of $4 prior preferred convertible stock, without par value, 1,367,440 shares of 6-percent preferred stock, par value $10 a share, 1,500,000 shares of preferred stock, par value $100 a share, and 22,000,000 shares of common stock, par value $1 a share.

Pursuant to a resolution adopted by the executive committee of the board at a special meeting held on February 9, 1955, applicant proposes to issue, subject to receipt of our authorization not later than May 31, 1955, not exceeding 1,367,440 shares of the new 6-percent preferred stock in connection with an exchange of such stock for

shares of its series A preferred stock, and not exceeding 14,768,352 shares of its common stock upon conversion of such 6-percent preferred stock, pursuant to an exchange offer dated February 10, 1955. Under such offer, the holders of applicant's outstanding series A preferred stock are given an opportunity to exchange their shares on the basis of 10 shares of 6-percent preferred stock for each share of series A preferred stock, subject to the approval of this Commission on or before May 31, 1955, and to the condition that 100,000 shares of series A preferred stock, or such lesser number as its board may deem sufficient to warrant consummation of the exchange offer, will be offered for exchange. The offer is open to all such holders until 3:30 p. m. eastern standard or daylight saving time, whichever is then in effect in the city of New York, on the closing date, which, under applicant's proposal, will be the fifth day (excluding Saturday, Sunday, and any legal holiday) after we have issued an order, substantially in the form requested, authorizing the proposed issue. Any holder of the Series A preferred stock may accept the offer and deposit for exchange all or any number of full shares held by him. He may revoke his acceptance of the offer as a whole or in part and direct the return of the deposited stock, by written notice to the exchange agent, The Marine Midland Trust Company of New York, at any time prior to 3:30 p. m. on the closing date. As soon as practicable after that date, if the required number of shares of series A preferred have been accepted by the exchange agent for exchange, the applicant will issue and deliver the required number of shares of 6-percent pre-

ferred stock in temporary form in accordance with the instructions set forth in the letter of transmittal accompanying the certificates surrendered. The applicant has reserved the right to extend the exchange offer for an additional period or periods. However, regardless of such possible extension or extensions, the conversion rights of the 6-percent preferred stock will be fixed as of the closing date and all shares tendered for exchange on or before 3:30 p. m. on that date will be exchanged as of such date. If the applicant determines not to consummate the exchange offer because less than 100,000 shares of series A preferred stock have been duly submitted for exchange or the requisite authority has not been granted by us on or before May 31, 1955, or if our order denies any material portion of the application or imposes terms or conditions which are not acceptable to it, the exchange offer will be void and the surrendered stock certificates will be returned to their respective owners. All exchanged shares of series A preferred stock will be retired. All costs and expenses of the exchange will be borne by the applicant except the expense incurred by the stockholders in delivering their stock to the exchange agent.

Of the series A preferred stock outstanding as of January 31, 1955, the chairman of applicant's board and his wife were the beneficial owners of 11,087 and 3,738 shares, respectively, and two other members of the board were beneficial owners of 12,959 and 500 shares, respectively. These holdings, aggregating 28,284 shares, represent approximately 20.7 percent of the 136,744 shares outstanding in the hands of the public. The ap-

plication represents that these stockholders each has the present intention of tendering approximately the same proportion of their holdings of such stock, as compared with the total number of shares thereof then outstanding, as are tendered by other persons. However, none of them has entered into any agreement with applicant, or is under any obligation to do so, each of them reserving the right to take whatever action may at the time be deemed desirable in his own interest under the circumstances existing at the time such stockholder makes his final decision. The three members of the board hereinbefore mentioned, as of January 31, 1955, were beneficial owners of 547,500 shares, or approximately 11.8 percent, of the 4,637,797 shares of applicant's common stock outstanding. Also, on that date, two of these directors and the wife of the chairman were beneficial owners of subscription warrants entitling them to purchase, in the aggregate, 241,940 shares of applicant's common stock at a price of $3.75 a share; and the chairman was the beneficial owner of options to purchase 100,000 shares of such stock at a price of $3.0625 a share.

If the exchange offer is consummated, the board intends, following the issuance of the 6-percent preferred stock, thereafter to commence the payment of dividends, if earned, with respect to all then outstanding shares of series A preferred stock at the annual rate of $5.50 a share. It should be noted, however, that neither the dividend requirements of the series A preferred stock nor of the 6-percent preferred stock were earned from portfolio income in either 1953 or 1954. Because of the uncertainty as to the number of

shares of series A preferred stock which may be surrendered; the board is not prepared presently to decide whether it will call for redemption the unexchanged shares or to what extent, except as hereinbefore stated, it will pay dividends on account of arrearages thereon.

The applicant has certain bank loans, two of which are evidenced by promissory notes, one to the Chase National Bank of the City of New York, authorized by our order of August 6, 1951, in Finance Docket No. 17423, *Alleghany Corporation Note,* 282 I. C. C. 807, and the other to The First National Bank of Boston, authorized by our order of September 3, 1952, in Finance Docket No. 17871, *Alleghany Corporation Notes,* 282 I. C. C. 817. The applicant has agreed, in connection with these two loans, as well as in the indenture pursuant to which its 5-percent sinking-fund debentures, due November 1, 1962, authorized by our order of November 20, 1952, in Finance Docket No. 17937, *Alleghany Corporation Securities,* 282 I. C. C. 818, were issued, among other things, not to pay, without the consent of such banks and the holders of two-thirds of the aggregate principal amount of outstanding debentures, any cash dividends or other distribution on, or to purchase, redeem, or otherwise retire, any shares of its capital stock, except in exchange for other shares of its capital stock, if the aggregate amount expended therefor would exceed a particular sum as computed under prescribed formulas. Accordingly, should applicant decide to redeem unexchanged shares of series A preferred stock, such redemption might conceivably require the consent of such banks and debenture holders.

A description of each class of applicant's stock, with preferences, conversion and other rights of each class of the authorized stock, is set for in the certificate.

The rights of holders of the 6-percent preferred stock and the series A preferred stock will be similar in many respects but there will be substantial differences as mentioned hereinafter. The 6-percent preferred stock is senior to the series A preferred stock and to the authorized but unissued preferred stock of which class the series A preferred stock is a series. The 6-percent preferred stock has a par value of $10 a share, whereas the series A preferred stock has a par value of $100 a share. When, and as declared by the board, the latter stock is entitled to cumulative dividends at the rate of 5½ percent per annum in preference to the common stock, whereas the 6-percent preferred stock is entitled to cumulative dividends at the rate of 6 percent per annum in preference to both the series A preferred and common stock. Dividends on the 6-percent preferred stock will be payable semiannually on April 1 and October 1, will be cumulative from May 1, 1955, and will begin October 1, 1955. The redemption value used in the conversion formula set forth below takes into account the fact that dividends on the 6-percent preferred stock do not commence to accrue until a date which may be subsequent to issuance and is designed to compensate therefor. Regarding 10 shares of the 6-percent preferred stock as the equivalent of 1 share of the series A preferred stock for the purposes of liquidation, dissolution

and/or redemption, there is no distinction in the amount payable (exclusive of dividend arrearages) to the holders of each class upon the happening of any of the aforesaid contingencies, except that payment will be made to the holders of the 6-percent preferred stock before any payment is made to the holders of the series A preferred stock. However, because the dividend arrearages on the series A preferred stock are substantial, the relative redemption values of each class are substantially different. The cash redemption value of 1 share of series A preferred stock on May 1, 1955, will be $237, whereas that of 10 shares of 6-percent preferred stock would aggregate $105, the difference of $132 representing accumulated and unpaid dividends. In the event of voluntary liquidation or dissolution of the applicant, or upon redemption, the holders of 6-percent preferred stock will be entitled to receive, before any payment is made to the preferred or common stockholders, $10.50 a share, and in case of involuntary liquidation or dissolution $10 a share, plus, in each instance, all dividends accumulated and unpaid thereon, whether or not earned or declared. Each share of series A preferred stock is in each such instance entitled to an amount (exclusive of dividend arrearages) equal to 10 times the equivalent amount set forth with respect to each share of 6-percent preferred stock. There is no restriction with respect to the repurchase or redemption of shares of either class of stock while there is any arrearage in the payment of dividends thereon, but the applicant, by the express terms of its certificate, is precluded from redeeming any shares of 6-per-

cent preferred stock prior to May 1, 1970. There is no such time limitation with respect to the redemption of series A preferred stock. Neither class of stock is entitled to preemptive rights. The series A preferred stock is entitled to the benefits of a sinking fund, the provisions of which are not operative at the present time because of accumulated dividends in arrears. In case of default in the payment of four quarterly installments of dividends on such stock, or the elapsing of 24 consecutive months during which applicant shall at no time have fully paid up all dividends thereon, such stock is entitled to elect two directors. Because of the default in the payment of dividends thereon, such stock is now entitled to elect two directors. There is no provision for a sinking fund for the 6-percent preferred stock. The holders thereof, voting as a class, have a right to elect two directors regardless of whether or not dividends are currently paid. The series A preferred stock is not convertible. The holder of each share of 6-percent preferred stock, at any time prior to 5 days before its redemption, will, upon payment to applicant of $3.75 per share of common stock into which such share is convertible, be entitled to convert such share into such number of fully paid and nonassessable shares of common stock, without adjustment for dividends in respect of either such share or the shares of the common stock into which it is converted, as shall be arrived at by dividing 23.7 (being 1/10 of the May 1, 1955 redemption price per share of series A prefered stock) by the difference between $3.75 and an amount equal to the closing price of the common stock on the New York Stock Ex-

change on the closing date of the exchange offer (or if no sale takes place on such date then an amount equal to the closing price on the last preceding day on which a sale is made). The result of such computation shall be computed to the nearest 1/10 of a share, provided, however, that in no event, regardless of the arithmetical result of such computation, shall any share of 6-percent preferred stock be convertible into more than 10.8 shares of common stock. At the time of the original issuance of the 6-percent preferred stock, the holders thereof will be advised by letter and by printed endorsement on the certificates representing such stock of the number of shares of common stock into which each share of 6-percent preferred stock is convertible upon payment of $3.75 per share of common stock. No fractional shares or scrip representing fractional shares will be issued upon such conversion. If the aggregate number of shares of 6-percent preferred stock surrendered for conversion at any one time by any one holder are convertible into a whole number and a fraction of shares of common stock, the number of shares of common stock issuable upon such conversion shall equal such whole number, and an amount equal to such fraction multiplied by the excess of the closing price on the New York Stock Exchange of the common stock on the effective date of such conversion (or if no sale took place on such date then the excess of the closing price on the last preceding day on which a sale was made) over $3.75 will be paid in cash by the applicant to such holder. In the event of any reclassification, exchange or other change of the common stock, or the declaration of or payment

of any dividend in shares of stock of any class, the number of shares of common stock (and in the case of the declaration or payment of any dividend in shares of stock of any other class, the number of shares of stock of such other class) issuable on conversion of the 6-percent preferred stock will be adjusted accordingly.

The affirmative approval of the holders of a majority of the outstanding shares of series A preferred stock is required before applicant may issue any additional shares of such stock or of any other class of stock on a parity with or having priority thereover. The issuance of any shares of stock on a parity with or having priority over the 6-percent preferred stock, or the making of any material change in applicant's certificate or bylaws, with respect to the latter stock, requires the affirmative approval of the holders of two-thirds of the outstanding shares thereof. As of February 16, 1955, 144,544 shares of series A preferred stock, out of an authorized 1,195,000 shares, were issued, of which 7,800 were held in applicant's treasury and 136,744 shares were outstanding in the hands of the public, held by approximately 1,186 stockholders. None of the 6-percent preferred stock has been issued.

The series A preferred stock and the common stock are listed on the New York Stock Exchange and applicant intends to make application to list on such Exchange the 6-percent preferred stock and the common stock into which such stock may be converted.

J. P. Morgan & Co., Incorporated, and Colonial Trust Company, both of New York City, have

been named as transfer agent and registrar, respectively, of the 6-percent preferred stock.

Of the authorized common stock, 4,641,585 shares were issued and outstanding in the hands of the public as of January 31, 1955, held by approximately 15,120 stockholders, including 8 directors of applicant who were the beneficial owners of 578,846 shares; 410,032 shares were reserved for issue upon conversion of the presently outstanding $4 prior preferred stock, 1,999,700 shares were reserved for issue upon exercise of the presently outstanding common stock subscription warrants of the applicant, and 100,000 shares were reserved for issue upon exercise of previously granted options. Common stockholders have waived their preemptive rights as to the 100,000 shares reserved in connection with previously granted options, as well as to an additional 55,000 shares of common stock, to be sold to directors, officers and employees of the applicant, upon exercise of options or otherwise, but such shares have not yet been sold, options covering them have not yet been granted, and such shares have not been reserved. Each holder of common stock is entitled to one vote for each share on matters on which such stock is entitled to vote, including the election of directors. There is no provision for cumulative voting of common stock. Upon liquidation or dissolution of the applicant, the holders of such stock will be entitled to share ratably in the assets remaining after payment of all amounts payable to the holders of the preference stocks. The holders of common stock are entitled to purchase ratably, according to their respective holdings, any shares of common stock

issued or sold for cash, and any stock purchase warrants or other option rights which may be issued giving the right to purchase shares of such stock for cash, in either case upon appropriate terms, but with certain designated exceptions, one of which includes any shares of common stock issued upon conversion of preferred stock convertible into common stock. Consequently, the shares of common stock proposed to be issued and sold upon conversion of the 6-percent preferred stock would not be subject to preemptive rights. The $3.75 which applicant will receive for each share of common stock issued upon conversion will be used for its general corporate purposes.

During January 1955, the high and low sales prices per share on the New York Stock Exchange of the series A preferred stock were $228 and $209.50, respectively, and of the common stock were $9.50 and $7.25, respectively.

As of January 31, 1955, there were issued and outstanding common stock subscription warrants of the applicant in bearer form, authorized by our order of November 20, 1952, in Finance Docket No. 17937, *Alleghany Corporation Securities, supra,* entitling the owners thereof from time to time, without limitation as to time, to subscribe for and purchase 1,999,700 shares of the authorized but unissued common stock at a price of $3.75 a share, which shares have been reserved for such purpose. Such warrants do not entitle the owners thereof to any voting rights or other rights as stockholders of the applicant, and no dividend or interest is payable or accrues with respect thereto or to the shares of common stock

which may be subscribed for and purchased thereunder until and unless, and except to the extent that, such warrants are exercised. These warrants are listed on the American Stock Exchange.

In September 1946, the applicant inaugurated a program of purchasing in the open market its own prior preferred convertible stock and series A preferred stock, and of presenting to the holders of those stocks a series of exchange offers and invitations for tenders with the object of benefiting the remaining holders of such preference stocks, and eventually restoring an asset equity for the common stock. As a result of this program, the applicant has eliminated the prior preferred convertible stock from its capital structure and drastically reduced the amount of its series A preferred stock outstanding, has eliminated substantial amounts of dividend arrearages, and the capital deficit has been wiped out.

The proposed issue of 6-percent preferred stock would result in a further substantial reduction in the dividend arrearage on the series A preferred stock, and a subsequent redemption of the unexchanged shares of the latter stock would complete the elimination of such arrearage and place applicant's capital structure on a current basis for the first time in over 20 years. Applicant's management is of the opinion that the proposed exchange offer is in the best interests of applicant and the holders of all three outstanding classes of its stock. No dividends were paid on any class of its stock from May 1, 1931, through the year 1949, nor in 1953. Dividends of $2.50, $5 and $10 a share were paid on its prior preferred convertible stock in 1950, 1951, and 1952, respectively. A

dividend of $4 a share was paid on its $4 prior preferred stock in 1954. The aggregate cash dividends paid in 1950, 1951, 1952 and 1954 were $89,567.50, $163,135, $333,470, and $103,380, respectively. Assuming a 100-percent exchange of series A preferred stock and that during the entire year 1956 there are issued and outstanding 25,845 shares of $4 prior preferred stock and 1,367,440 shares of 6-percent preferred stock, the aggregate dividend requirements for each class of such stock would be $103,380 and $820,464, respectively. Applicant expects its portfolio income during 1955 to be sufficient to meet the dividend requirements on all classes of its preferred stock. In addition, it expects to realize substantial income from the sale of securities, which income is also available for the payment of dividends.

The dividend accumulations on the series A preferred stock must be paid before dividends may be paid on the common stock. To the extent that the series A preferred stock is redeemed instead of exchanged, or dividend arrearages thereon are paid in cash, applicant's assets will be reduced by the aggregate redemption price of the stock redeemed, and its income, derived from investments, may be reasonably expected to be reduced accordingly.

The conversion rights of the 6-percent preferred stock will afford the holders thereof an opportunity to participate in the progress of applicant, as reflected in the market value of its common stock. Although their existence will not have any immediate effect on the common stock, the exercise thereof will at that time have the

effect of diluting the rights of the common stockholders, as such rights then exist. Assuming that the 136,744 presently outstanding shares of series A preferred stock are exchanged and the shares of 6-percent preferred stock are ultimately converted into common stock, and assuming closing prices of such common stock of $6 and $8.375 a share, there would be required to be issued 14,358,120 and 6,973,944 shares of common stock or about 75.6 and 60.1 percent, respectively, of all shares thereof outstanding upon giving effect to such conversion, for which applicant would receive an aggregate of $53,842,950 and $26,152,290, respectively, in payment for such shares (less such nominal sums as may be paid for fractional shares on conversion) which cash will be available for working capital and investment.

The short term effect of the exchange of series A preferred stock for 6-percent preferred stock will result in a substantial increase in the net asset value per share of applicant's common stock by reason of the elimination of arrearages on the series A preferred stock. The 6-percent preferred stock is not redeemable by the applicant until May 1, 1970, thereby precluding forced conversion for the period. Consequently, it is expected that at least until dividends are paid on the common stock, a substantial part of the 6-percent preferred stock will remain unconverted and outstanding. However, to the extent that the 6-percent preferred stock is converted into common stock, such conversions will tend to reduce the net asset value of the common stock if such value at such time exceeds approximately $4.50 a share.

The applicant's general balance sheet as of November 30, 1954, in which investments are shown at cost, less an adjustment reserve, shows the following items, among others:

Assets		
Total investments		$43, 264, 637
Current assets		8, 256, 621
Deferred assets		7, 075
Unadjusted debits		1, 362, 699
Total assets		52, 891, 032
Liabilities		
Capital stock:		
$4 prior preferred convertible	$2, 067, 600	
Preferred	13, 674, 400	
Common	4, 637, 797	
Premiums on common stock	142, 297	
Total stock		20, 522, 094
Long-term funded debt unmatured:		
Book liability	$21, 200, 000	
Reacquired and held in treasury	504, 000	
Total long-term debt		20, 696, 000
Current liabilities		2, 427, 928
Deferred liabilities		2, 050
Surplus—unearned	$106, 976, 335	
Earned-appropriated	718	
Earned-unappropriated (deficit)	97, 734, 093	
Total surplus		9, 242, 960
Total liabilities		52, 891, 032

Another balance sheet statement of applicant as of the same date, but reflecting certain investments in securities at values based on market quotations on that date, shows total assets of $82,069,676 and total surplus $38,645,208. Its income statements for 1951, 1952, 1953, and the first 11 months of 1954 show net income, exclusive of profit and loss on security transactions, of $920,-

378, $861,652, $244,222, and $161,593, respectively. These statements also show that from the sale of securities applicant sustained a net loss of $605,037 in 1951, and gains of $50,806, $6,452,830, and $1,357,640 in 1952, 1953, and the 11-month period in 1954, respectively.

It is pointed out by applicant that on the basis of an exchange of 100,000 shares of series A preferred stock and redemption of the remaining 36,744 shares, the arrears of dividends thereon would be eliminated at a cost of about one-fourth the amount of cash that would be required to redeem all such stock, and if all the stock should be exchanged, the accumulated dividends would be eliminated entirely without the expenditure of any cash. The aggregate accrued dividends on such stock as of January 31, 1955, were $17,862,185 or $130.625 a share. Inasmuch as there is no dividend arrearage on the $4 prior preferred stock and dividends are currently being paid thereon, the 6-percent preferred stock would be entitled to receive dividends on a current basis.

Applicant has entered into an agreement, dated February 8, 1955, with Kidder, Peabody & Co., as dealer manager, whereby the latter agrees to use its best efforts to form and manage a group of securities dealers, including itself, to solicit acceptances of the exchange offer by holders of series A preferred stock. The soliciting dealers, including the dealer manager, will receive a commission of $1 for each share of series A preferred stock submitted through them to the exchange agent and exchanged in accordance with the exchange offer; provided, however, that the max-

imum aggregate commissions payable with respect to any single holder of record will be $300, except in certain cases in which the stock is beneficially owned by others. The payment of such soliciting dealers' commissions is subject to the exchange offer being consummated. The dealer manager will be reimbursed for its out-of-pocket expenses up to $2,000, and if the exchange offer is consummated, it will receive the additional sum of $10,000, as a flat fee for its services and an amount equal to the aggregate commissions payable by it as dealer manager to the soliciting dealers, including itself, as provided in the agreement. The applicant will not solicit such exchanges. The dealer manager is not authorized to act as agent of the applicant and the soliciting dealers are not authorized to act as agents of the applicant or of the dealer manager.

The expenses to be incurred in connection with the proposed issue of 6-percent preferred stock, and common stock upon conversion thereof, cannot be estimated accurately at the present time because of the uncertainty of certain features of the transactions, including the number of certificates that will have to be handled. Certain other expenses, such as counsel fees, printing, and other items shown in the application are estimated at $70,580.

The proposed issue comes within exceptions (1) and (2) set forth in the Commission's report of May 8, 1944, in Ex Parte 158, *In Re Competitive Bidding in Sale of Securities*, 257 I. C. C. 129 (164), and competitive bidding is, therefore, not required in connection therewith.

Interveners allege that the exchange offer and the proposed issuance of securities are not for lawful objects within the corporate purposes of the applicant, are not compatible with the public interest, are unfair and inequitable to the holders of its common stock, and will result in unjust enrichment of the holders of the series A preferred stock; but, except to the limited extent mentioned below, their charges are lacking in particularity and are not supported by factual statements showing wherein the proposal is unlawful or unfair.

Interveners state that issue of stock as proposed will dilute the equity of the common stock and, as a result thereof, holders of such stock will not receive a fair and just return on the present value of their investments. We have already pointed out that conversion of the 6-percent preferred stock will result in diluting the rights of the common stock. However, such fact does not make the proposal unfair, as compensating advantages, which have been described, will accrue to the common stockholders. The ultimate worth of the conversion rights, which holders of the series A preferred stock who accept the exchange offer will receive in partial satisfaction for the surrender of their rights to accrued and unpaid dividends, will be, of course, contingent upon the future value of the common stock. The immediate effect of the exchange of series A preferred stock for the 6-percent preferred stock will be to increase the net asset value of the common stock.

Interveners state that the common stockholders have not been protected by "arm's-length bargain-

ing" between persons owning or representing only common stock and owners or representatives of the other classes of securities affected by the transactions, and that the terms of the transactions have been imposed solely by management interests under the domination and control of the chairman of applicant's board of directors, whose total investment in series A preferred stock, with that of his wife, exceeds that in the common stock. A sufficient answer to this contention appears to be furnished by the fact that the charter amendment authorizing the issue and exchange of the 6-percent preferred stock was approved by the votes of holders of 3,269,217 shares of applicant's common stock, which constituted 70 percent of the total outstanding common stock and more than 97 percent of the common stock voted on such proposal. As of January 31, 1955, the directors of applicant owned 578,846 shares of common stock and the bulk of this (516,500 shares) was beneficially owned by its president, who owned only 12,959 shares of series A preferred stock. Based on high sales prices of these stocks in January, recited above, this person's investment in common stock was approximately 69 percent greater than his investment in preferred stock. In addition, he beneficially owned warrants entitling him to purchase 226,340 shares of common stock.

Other allegations of interveners raise questions as to the necessity of the proposed exchange, and they suggest that applicant should devote its available resources to the redemption and retirement of the series A preferred stock instead of

making new investments and extending the risk of the common stock's equity. It is not our function to substitute our judgment for that of management, where the latter has exercised sound discretion and where as here the findings required by the statute as a condition to approval of the issue of securities properly may be made.

It does not appear that the proposed issue will adversely affect any carrier under the control of the applicant, or impair such carriers' ability to serve the public. Nor, with the modification hereinafter stated, does it appear that the proposal will be unfair or inequitable to any class of the applicant's stockholders.

In order to eliminate the possibility of manipulation of the common stock prices, with the object of influencing the conversion rights of the 6-percent preferred stock, and to make it possible for holders of the series A preferred stock to determine prior to the closing date of the exchange offer what the conversion ratio will be, our approval of the proposed issue of stock will be conditioned upon modification of the exchange offer so that, in lieu of the provision under which the conversion rights would be dependent upon the price of the common stock on a date subsequent to our order, the conversion ratio will be dependent upon the closing price of applicant's common stock on the New York Stock Exchange on the last day preceding the date of our order, or if no sale takes place on that day, on the closing price on the last preceding day on which a sale is made.

Subject to the foregoing condition, we find that the proposed issue by the Alleghany Corporation

of not exceeding 1,367,440 shares of 6-percent convertible preferred stock, par value $10 a share, and not exceeding 14,768,352 shares of common stock, par value $1 a share, upon conversion of the 6-percent convertible preferred stock, as aforesaid, is consistent with the proper performance of its service to the public by each carrier which is under the control of such corporation, that it will not impair the ability of any such carrier to perform such service, that it is otherwise consistent with the public interest, and that it (a) is for lawful objects within its corporate purposes and compatible with the public interest, which are necessary and appropriate for and consistent with the proper performance by such carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purposes.

An appropriate order will be entered, in which suitable provision will be made for submission of journal entries to record the transaction.

ORDER

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 26th day of May, A. D. 1955

Finance Docket No. 18866

ALLEGHANY CORPORATION STOCK

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made

and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That, subject to the condition stated in the aforesaid report, the Alleghany Corporation be, and it is hereby, authorized to issue (a) not exceeding 1,367,440 shares of 6-percent convertible preferred stock, par value $10 a share, to be offered to the holders of its cumulative 5½-percent preferred stock, series A, par value $100 a share, in exchange, on the basis of 10 shares of 6-percent convertible preferred stock for each share of cumulative 5½-percent preferred stock, series A, and (b) not exceeding 14,768,352 shares of common stock, par value $1 a share, upon conversion of such 6-percent convertible preferred stock, on the basis set forth in the application and aforesaid report, the proceeds from the issue of such common stock to be used for general corporate purposes;

It is further ordered, That, except as herein authorized, said stock shall not be sold, pledged, repledged, or otherwise disposed of by the applicant, unless or until so ordered or approved by this Commission;

It is further ordered, That the applicant shall report concerning the matters herein involved in conformity with the order of the Commission, by division 4, dated August 9, 1946, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 C. F. R. 56);

It is further ordered, That the applicant shall submit for the consideration and approval of this Commission three copies of the journal entries required to record the transaction;

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said stock, or dividends thereon, on the part of the United States; and

It is further ordered, That this order shall be effective 10 days from and after its date.

By the Commission, division 4.

[SEAL] HAROLD D. MCCOY,
Secretary.

APPENDIX D

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1 et seq. are as follows:

> SEC. 5 (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—
>
> (i) * * * or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise;
>
> * * * * * *
>
> SEC. 5 (3). Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20 (1) to (10), inclusive, of this part, sections 204 (a) (1) and (2) and 220 of Part II, and section 313 of part III, (which relate to reports, accounts, and so forth, of carriers), and section 20a (2) to (11), inclusive, of this part, and section 214 of part II, (which relate to issues of securities and assumptions of liability of carriers), in-

cluding in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a of this part and of section 214 of part II, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

SEC. 5 (7). The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this part; and with respect to any violation of paragraphs (2) to (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this part shall apply to such a violation by any other person.

* * * * *

SEC. 20a (2). From and after one hundred and twenty days after this section

takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities or any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

* * * * * *

SEC. 20a (11). Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if

issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1937

In the Supreme Court of the United States

October Term, 1957

No. 618

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

BRESWICK & CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY OF THE INTERSTATE COMMERCE COMMISSION TO APPELLEES' MOTION TO AFFIRM

The appellees' motion to affirm the judgment below illustrates dramatically our contention that the District Court's decision was based upon an issue foreclosed by the earlier decision of this Court, and that appellees' motion to affirm is based largely upon matters which the appellees had no standing to raise and which, therefore, that court had no power to consider.[1]

[1] We will not repeat here the contention in our Jurisdictional Statement that the decision below violates the mandate of this Court in *Alleghany Corporation* v. *Breswick & Co.*, 353 U. S. 151, or the reasons stated in our brief before this Court, for our view that the court below erred in again holding that Alleghany's control of New York Central System requires the Commission's approval under Section 5 of the Interstate Com-

1. The appellees' contention that the Commission's order violated Section 20a of the Interstate Commerce Act, in that it authorized Alleghany Corporation to capitalize its allegedly illegally acquired investment in New York Central common stock, is completely without substance. It is true that in cases cited by appellees (Motion, pp. 16–18), the Commission has refused to authorize, under Section 20a, carriers to issue *additional* securities on the basis of carrier properties or securities acquired without the Commission's approval under Section 5. It is obvious that the principle of those cases has no application in this case where the securities authorized by the Commission are not related to the capitalization of any particular assets or acquisition of assets by Alleghany, but were issued solely in exchange for outstanding preferred stock plus accumulated dividends. No case cited by the appellees (or by the court below) is to the contrary. Moreover, no such issue was presented to the Commission, and the appellees as common stockholders of Alleghany do not show that they have standing to raise it.

2. The appellees also contend that the Commission's order is invalid on the ground that on the date of the order the market value of Alleghany's investments was less than the aggregate market value of Alleghany's outstanding securities (Motion, pp. 29–35). Specifically, they assert that "it is plainly con-

---

merce Act. Also, we need not comment upon the appellees' statement of the question as [redacted] whether the court below correctly "affirmed" the decision of Division 4 of the Interstate Commerce Commission.

trary to the public interest to facilitate the unloading upon the public markets of equity securities when there exists a shortage of assets to support the market prices at which the outstanding equity securities are selling" (Motion, p. 33).

The complete lack of merit in this argument is demonstrated by the fact that it is based upon three prior Commission cases involving *increases* in carriers' capital structures through the issuance of *new and additional* securities. Here, the Commission's order authorized Alleghany to issue convertible preferred stock in exchange for outstanding preferred stock and dividend arrearages. As a practical matter, appellees' argument reduces to the preposterous contention that Section 20a permits or prohibits Alleghany from issuing stock in exchange for its preferred stock and accumulated dividends, depending upon the fluctuating market prices for Alleghany's stocks and for its investments.

3. Before the Commission and up to this point in this litigation, the appellees attacked the Commission's stock order as being unduly favorable to the holders of Alleghany's outstanding 5½% preferred stock. This attack was based upon various speculative calculations of benefit which were in turn based upon stock market quotations in 1955. Indeed, this Court held that appellees' only standing in the case derived from the alleged dilution of the common stock equity. With fluctuating market conditions, the appellees' attack upon the order has shifted to alleged concern for the welfare of Alleghany's preferred stockholders—to the adequacy of the asset

coverage of the new convertible preferred shares. Appellees, as holders of 700 shares of Alleghany common, clearly lack standing to represent the interests of the preferred stockholders. Indeed, such opportunistic changes of position with the stock market suggest that they have no genuine interest at all.

4. The whole thrust of the appellees' position, both in the District Court and this Court, has been to misrepresent the purpose and rationale of the Commission's order. Briefly, that rationale is this: since 1946, Alleghany has engaged in a series of stock purchase and exchange programs with the objective of eliminating huge preferred stock dividend arrearages which had accumulated since 1931; the Commission's instant order authorized Alleghany to largely complete this program, thereby finally placing its capital structure upon a current basis, by offering new 6% convertible preferred shares in exchange for outstanding 5½% convertible preferred shares plus more than $17,000,000 in dividend arrearages. The primary issue was the general fairness of the plan for the elimination of the dividend arrearages on the old preferred stock—a common problem in voluntary recapitalizations since the great depression. See II Deming, *Financial Policy of Corporations,* (1953) pp. 1194–1209. The Commission could not undertake to predict what the effect of each conversion as it takes place over the life of the new preferred stock would be under changing market conditions. It could only determine the general fairness of the plan,

and that its result would be consistent with the standards of Section 20a. It bears emphasis that preferred stockholders without dividends for 24 years, and common stockholders whose prospects are buried under such dividend arrearages, cannot find in any exchange offer the security of government bonds.

The appellees have insisted variously that the fairness of the exchange offer must be determined as of June 23, 1955, when they alleged it was unfair to the common stockholders, or as of today, when they insist it is unfair to the preferred stockholders. It is settled that the Commission need not give controlling weight to temporary market quotations. Rather, as this Court held under the Public Utility Holding Company Act, "the informed judgment of the Commission rather than that of the market, has been designated by the Act as the appropriate guide." *Niagara Hudson Corp.* v. *Leventritt,* 340 U. S. 336, 346–347.

The other prong of their attack has been, as we have pointed out, irrelevant insistence that the Commission should have applied standards of asset coverage and capitalization which, on their face, have no application to an exchange of securities which results in no increase in capital structure.

The crucial fact remains that, leaving aside issues which were not properly before the court below, that court has sustained the Commission's order as satisfying every pertinent standard and requirement of the Interstate Commerce Act.

CONCLUSION

We contend, for the reasons set forth in our Jurisdictional Statement, that the judgment of the District Court is based solely upon issues barred to that court by the prior decision of this Court in *Alleghany Corporation* v. *Breswick & Co.*, 353 U. S. 151. The appellees' motion to affirm demonstrates that the judgment can be sustained only upon grounds which are legally and factually irrelevant to the present case, even if the appellees had standing to raise them and had done so before the Commission. Accordingly, we submit that the motion to affirm should be denied, and the appellant's prayer for summary reversal of the decision below should be granted.

Respectfully submitted,

ROBERT W. GINNANE,
General Counsel.
Interstate Commerce Commission,
Washington 25, D. C.

DECEMBER 1957.

U. S. GOVERNMENT PRINTING OFFICE 1957